SUPREME COURT, U. S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1966

No. 36

HUBERT L. WILL, JUDGE, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, PETITIONER,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 29, 1966
CERTIORARI GRANTED MARCH 13, 1967

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 918

HUBERT L. WILL, JUDGE, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, PETITIONER,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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[fol. 1]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Before Hon. Luther M. Swygert, Circuit Judge.

No. 15607

UNITED STATES OF AMERICA, Petitioner,

vs.

HONORABLE HUBERT L. WILL, Judge, United States District Court for the Northern District of Illinois, Respondent.

ORDER—March 15, 1966

Upon consideration of the emergency petition of the United States of America for a stay order pending filing of a petition for mandamus, It Is Ordered that said stay be granted and all proceedings in Case No. 65 CR 432, United States v. Simmie S. Horwitz, and in Case No. 65 CR 464, United States v. Simmie S. Horwitz, pending before Honorable Hubert L. Will, Judge of the United States District Court for the Northern District of Illinois, be stayed until further order of this Court.

And, It Is Further Ordered that the United States of America, Petitioner, be granted leave to file its petition for mandamus to vacate the order directing petitioner to answer Item 25(a), (b), (c), (e), (f) and (g) of the Bill of Particulars by Monday, March 21, 1966.

[fol. 2] [File endorsement omitted]

[fol. 3]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 15607

[Title omitted]

PETITION FOR WRIT OF MANDAMUS—Filed March 21, 1966

Now comes the United States of America by Edward V. Hanrahan, United States Attorney for the Northern District of Illinois, and files this, its petition for a writ of mandamus against the Honorable Hubert L. Will, United States District Judge of the United States District Court for the Northern District of Illinois and respectfully represents:

1. On June 15, 1965, indictment No. 65 CR 432 was returned in the United States District Court for the Northern District of Illinois charging one Simmie S. Horwitz with a violation of Title 26, United States Code, Section 7206(1). (App. 8).[1]

[fol. 4] 2. On June 29, 1965, indictment No. 65 CR 464 was returned in the United States District Court for the Northern District of Illinois charging Simmie S. Horwitz with a similar but distinct violation of Title 26, United States Code, Section 7206(1). (App. 7). At all subsequent proceedings these indictments have been dealt with on a consolidated basis.

3. On September 7, 1965, the defendant filed, with certain other motions, a motion in the alternative for a bill of particulars. (App. 9-15).

4. Following the filing on October 21, 1965 of the Government's answer in opposition to defendant's motion for a

[1] References to (App. . . .) are to the Appendix filed with this Petition.

bill of particulars (App. 15-27), and the filing, on November 1, 1965, of the defendant's reply in support of his motion for a bill of particulars, the Court, on November 29, 1965, entered an order granting defendant's motion for a bill of particulars, except as to particulars 4 and 29(b). (App. 46).

5. On December 3, 1965, the Government filed a motion to vacate the Court's order of November 29, 1965, with respect to particulars 7, 14, 25, 28, and 29(a). (App. 46).

6. On December 7, 1965, the Court denied the Government's motion to vacate the certain portions of the Court's order of November 29, 1965, with the exception of question 25(d). (App. 47). Subsequently, on March 7, 1966, the Court stated that the Government would not be required to answer question 29(a). (App. 48).

7. The Government has filed answers to all questions contained in defendant's bill of particulars as directed by the Court, except question 25(a), (b), (c), (e), (f), and (g). On March 14, 1966, the Government informed the Court that it declined to answer that question. The causes were continued to March 15, 1966.

[fol. 5] 8. On March 15, 1966, on petition of the Government, this Court granted a stay of all proceedings until further order of this Court and granted the Government leave to file its petition for mandamus to vacate the District Court's order directing the Government to answer certain items of the bill of particulars by March 21, 1966. (App. 49).

9. Question 25 of the defendant's bill of particulars, which the District Court has ordered the Government to answer, except for part (d), is set forth as follows, together with question 24, which the Government has answered in the affirmative:

> "24. Does the Government rely upon any oral statements of the Defendant to support the charge in the several counts of the Indictments.

"25. If the answer to Request No. 24 is in the affirmative, state with respect to each such statement, if there was more than one:

a. The name and address of the person to whom the statement was made;

b. The date on which the statement was made;

c. The place where it was made;

d. The substance of the statement;

e. Whether the persons to whom the statement was made was a Government Agent at the time of the statement;

f. The names and addresses of any other persons present at the time the statement was made; and

g. Whether a written memorandum or verbatim transcript of the oral statement was made, and, if so, whether the Government has possession of the memorandum or transcript."

10. The scope of Rule 7(f) and Rule 16 of the Federal Rules of Criminal Procedure is to fully advise the defendant of the nature of the charge. *Wong Tai* v. *United* [fol. 6] *States,* 273 U.S. 77, 82 (1927). The Rules do not permit, and the respondent is without power to order the government to furnish a list of witnesses. *United States* v. *Eddington,* 328 F.2d 760 (7th Cir. 1964), cert. den. 379 U.S. 818; *Cordova* v. *United States,* 303 F.2d 454, 455 (10th Cir. 1962); *Dean* v. *United States,* 265 F.2d 544 (8th Cir. 1959); *Bohn* v. *United States,* 260 F.2d 773 (8th Cir. 1958), cert. den. 358 U.S. 931. Unless this Court proscribes such unwarranted disclosure of the Government's witnesses, the respondent will be permitted to totally disregard the limitations of the criminal discovery rules which this Court recently held to have the force and effect of law and to be binding on the District Judge. *United States* v. *Igoe,* 331

F.2d 766 (7th Cir. 1964), cert. den. 380 U.S. 942, reh. denied 380 U.S. 989.

11. Where Congress has felt that a list of witnesses is necessary in the administration of criminal law, it has so provided. Congress has required that the Government produce a list of its witnesses only in treason and capital offenses and only then the list is to be produced three days before the commencement of trial. 18 U.S.C. 1342. The statute does not apply to non-treason and non-capital offenses. *United States* v. *Van Duzee*, 140 U.S. 169, 173 (1891).

12. Neither the federal statutes, existing discovery rules, nor the Amendment transmitted this term by the United States Supreme Court to Congress to become effective July 1, 1966, empower the court to authorize the discovery ordered by the respondent. If there are impelling reasons for furnishing the identity of the Government's material witnesses in advance of trial, other provisions should be made by rule or statute. Yet, in the absence of any authorization whatsoever, after considering only the defendant's [fol. 7] unsupported allegation of need (App. 14-15), the respondent ordered the Government to reveal nearly all of its evidence in advance of trial, including a list of its material witnesses. The Federal Rules of Criminal Procedure were designed to protect the rights of the Government as well as the rights of the defendant, and they do not contemplate unlimited discovery by the defendant. *Bowman Dairy* v. *United States*, 341 U.S. 214 (1951).

13. This Court, in *Atlass* v. *Miner*, 265 F.2d 312-319 (7th Cir. 1959), and the Supreme Court, in affirming *Miner* v. *Atlass*, 363 U.S. 641 (1960), restrained by writ of mandamus a District Judge from expanding discovery. In the cited case the Supreme Court found the proposed extensions of discovery not within the rule-making power reserved to the District Courts under Rule 44 of the Admiralty Rules. Here the respondent has attempted to extend criminal dis-

covery beyond the Rules in violation of Rule 57(a) of the Federal Rules of Criminal Procedure which prohibits the District Court from making rules in violation of the Federal Rules of Criminal Procedure. This Court has awarded writs of mandamus and prohibited unauthorized discovery when it determined that a " . . . critical issue raised at this juncture strikes at a fundamental procedural question. . . . " *Atlass* v. *Miner,* 265 F.2d 312, 313 (7th Cir. 1959). A fundamental procedural question is here raised: must the Government disclose a list of its witnesses to the defendant in advance of trial? As in *Atlass,* there is no such provision in the rules permitting the court to order such disclosure.

14. If the respondent's patently illegal ruling is not reviewable, a "serious interference with the prosecution of persons indicted for criminal offenses might result." *Ex* [fol. 8] *parte United States,* 287 U.S. 241, 249 (1932). The obtaining of a definitive statement of the applicable legal principle is vital to the proper administration of criminal justice. The Government has no remedy other than by mandamus. *Carroll* v. *United States,* 354 U.S. 394, 399-400, 404-405 (1957); *United States* v. *Heath,* 260 F.2d 623, 627-628, 631-632 (9th Cir. 1958).

15. This Court has supervisory jurisdiction to issue a writ of mandamus ordering the respondent to vacate the illegal order jeopardizing effective prosecution of the defendant. *United States* v. *Igoe,* 331 F.2d 766 (7th Cir. 1964), cert. den. 380 U.S. 942, reh. denied 380 U.S. 989; *Howes Leather Company* v. *LaBuy,* 226 F.2d 703, 708-711 (7th Cir. 1955), affd. sub nom. *LaBuy* v. *Howes Leather Company,* 352 U.S. 249, 255-257; *Atlass* v. *Miner,* 265 F.2d 312, 313 (7th Cir. 1959), affd. *Miner* v. *Atlass,* 363 U.S. 641-650; *Schlagenhauf* v. *Holder,* 321 F.2d 43 (7th Cir. 1963), vacated and remanded on other grounds, 379 U.S. 104, 109-110; *United States* v. *Smith,* 331 U.S. 469, 471, 474 (1947); *De Beers Mines* v. *United States,* 325 U.S. 212, 217 (1945); *Ex Parte United States,* 287 U.S. 241, 246, 249 (1932); *Virginia* v. *Rives,* 100 U.S. 313, 323 (1879).

Wherefore, for the foregoing reasons, we respectfully request that this Court issue a writ of mandamus ordering the Honorable Hubert L. Will to vacate his order direct-
[fol. 9] ing the Government to answer question 25 of the defendant's motion for a bill of particulars.

Respectfully submitted,

Edward V. Hanrahan, United States Attorney.

John Peter Lulinski, Lawrence Jay Weiner, Richard G. Schultz, Robert A. Galbraith, Assistant United States Attorneys, Of Counsel.

[fol. 10] *Duly sworn to by Richard G. Schultz, jurat omitted in printing.*

[fol. 11]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 15607

UNITED STATES OF AMERICA, Petitioner,

vs.

HONORABLE HUBERT L. WILL, Judge, United States District Court for the Northern District of Illinois, Respondent.

Appendix to Petition for Writ of Mandamus—Filed March 21, 1966

[File endorsement omitted]

[fol. 12]

DOCKET ENTRIES

Title of Case—The United States vs. Simmie S. Horwitz 7119 Tripp Ave., Lincolnwood, Ill.

Attorneys—

For U.S.—Edward V. Hanrahan, U.S. Atty., R. A. Galbraith, Asst., R. G. Schultz, Asst.

For Defendant: Harvey Silets, 7 So. Dearborn St.

Violation: Prepared a false Income Tax Return 1 Count Sec. 7206(1), Internal Revenue Code of 1965: T. 26, U.S.C.

Date	Proceedings
6-15-65	Filed indictment and designation (65 CR 432) (Comm. $1,000.00 O. R.) (JS 2)
6-15-65	Order indictment returned in open court—Perry, J. (65 CR 432)
6-29-65	Filed indictment and designation (65 CR 464) (Comm. $1,000.00 O.R.) (JS 2)
6-29-65	Order Indictment returned in open Court.—Perry, J. (65 CR 464) sw
7- 6-65	Filed Appearance Bond for $1,000.00 O.R. sw
7- 6-65	Defendant with counsel waives reading of the Indictment and enters plea of not guilty. Defendant given 60 days to file motions he deems appropriate. Government given 15 days thereafter to reply to motions if filed. Cause continued to August 9, 1965 at 2 P.M. before Judge Hubert L. Will, to be set for trial. With no objection by the Government Defendant may be enlarged on his own recognizance in the sum of $1,000.00—Hoffman, J. Mailed Notices 7-8-65 sw

[fol. 13]

Date	Proceedings
8- 9-65	Order cause continued to September 27, 1965 at 10:00 A.M. to set trial.—Will, J. Mailed Notices 8-11-65 sw
9- 7-65	Filed Defendants motion in the alternative for bill of particulars.
9- 7-65	Filed brief in supoŕt of defendant's motion in the alternative for bill of particulars
9- 7-65	Motion to dismiss the indictment for violation of Rule 6(e) of the Federal rules of Criminal Procedure.
9- 7-65	Filed defendant's motion for entry of an order dismissing the indictments.
9- 7-65	Filed Memorandum in support of defendant's motion to dismiss the indictment for violation of Rule 6(e) of the Federal Rules of Criminal Procedure.
9- 7-65	Filed Certificate of mailing.
9-21-65	On motion of Government, order time to answer defendant's pre-trial motions extended for a period of 20 days, defendant to reply within 10 days thereafter. Order defendants pre-trial motions taken under advisement and cause removed from the call of September 27, 1965.—Will, J Mailed Notices 9-22-65 sw
10- 8-65	Government's motion to extend to answer defendants motion for Bill of Particulars from October 11, 1965 to and including November 20, 1965 granted.—Will, J Notices 10-11-65 sw

[fol. 14]

10-21-65	Filed Government's answer to Defendant's motion in the alternative for Bill of Particulars. (To HLW) sw

Date	Proceedings
11- 1-65	Filed defendant's reply in support of His Motion for Bill of Particulars
11- 1-65	Filed Defendant's reply to motion to dismiss for violation of Rule 6(e) (to HLW) sw
11- 2-65	Motion to extend time for filing Reply Briefs to November 5, 1965, by agreement, granted.—Will, J Notices 11-3-65 sw
11- 5-65	Filed Defendant's reply memorandum in support of his motion for entry of an order dismissing the indictments. (To Judge Will.) sw
11-19-65	On Court's own motion, order cause set for November 29, 1965 at 10:00 A.M. for ruling on pending motions and to set for trial.—Will, J Notices 11-22-65 sw
11-29-65	Order defendant's motions to dismiss the indictment denied. Order defendant's motion for a bill of particulars granted, except as to particulars 4 and 29(b). Order cause set for January 3, 1966 at 2:00 P.M. to set trial.—Will, J Notices 11-30-65 sw
12- 3-65	Governments motion to vacate court order of November 29, 1965 and memorandum in support taken under advisement.—Will, J Notices 12-6-65 sw
[fol. 15]	
12- 7-65	Filed Memorandum opinion (Copy to D.A. & Harvey Silets) sw
12- 7-65	Pursuant to memorandum opinion this day filed order Government's motion to vacate certain portions of this Court's order of November 29, 1965 denied with the exception of question 25(d).—Will, M Notices 12-9-65 sw

Date	Proceedings
12-10-65	Filed Government's answer to Defendant's bill of particulars (To HLW) (Refers also to Cause No. 65 CR432) sw
12- 3-65	Filed motion
12- 3-65	Filed memorandum in support of the Government's motion to vacate the order of this court directing the United States of America to furnish to the Defendant the names and addresses of the potential Government witnesses it proposes to use in this cause. (To HLW) sw
12-23-65	On Court's own motion, order cause reset from January 3, 1966 to January 4, 1966 at 10:00 A.M. to set trial.—Will, J Notices 12-27-65 sw
1- 4-66	Filed motion for entry of an order directing the Government to furnish particulars, or, in the alternative, to dismiss indictments.
1- 4-66	Motion for entry of an Order directing the Government to furnish particulars, or in the alternative, to dismiss Indictments, entered and continued to March 7, 1966 at 10:00 A.M.—Will, J. (Refers also to 65 ER 432)
[fol. 16]	
1- 4-66	Filed motion to dismiss indictments
1- 4-66	Defendant's motion to dismiss the indictments entered and continued to March 7, 1966 at 10:00 A.M.—Will, J Notices 1-10-66 sw
1- 4-66	Order cause continued to March 7, 1966 at 10:00 A.M. to set trial.—Will, J Notices 1-10-66 sw
1- 4-66	Filed amended bill of Particulars (To: HLW) sw

Date	Proceedings	
1-26-66	Clerk's File Copy of Transcript of Proceedings had before Hon. Hubert L. Will on Dec. 3, 1965 at 10 A.M. filed by Official Court Reporter (Re 65 CR 432 and 65 CR 464).	r
1-26-66	Clerk's File Copy of Transcript of Proceedings had before Hon. Hubert L. Will on January 4, 1966 at 10 A.M. filed by Official Court Reporter (Re 65 CR 432 and 65 CR 464).	r
1-26-66	Clerk's File Copy of Transcript of Proceedings had before Hon. Hubert L. Will on November 29, 1965 at 10 A.M. filed by Official Court Reporter (Re 65 CR 432 and 65 CR 464).	r
3- 7-66	Order Government to answer questions 14 and 25 of Defendant's motion for Bill of Particulars, as originally requested, within one (1) week. Order cause continued to March 14, 1966 at 10:00 A.M. to set trial.—Will, J Notices 3-9-66	sw
3-14-66	Filed Government's answer to item 14 of the Defendant's Bill of Particulars. (to HLW. Filed in 65 CR 432)	sw
[fol. 17]		
3-14-66	Government refuses to answer question #25 of the defendant's motion for bill of particulars as limited and as ordered by the Court. Defendant renews motion to dismiss the indictment and ruling on said motion reserved. Order cause continued to March 15, 1966 at 10:00 A.M.—Will, J Notices 3-15-66	sw
3-15-66	Defendant's motion to dismiss indictment continued generally.—Will, J Notices 3-16-66	sw

Date	Proceedings
3-16-66	Filed certified copy of Order of U.S.C.A. granting stay of all proceedings until further order of court and U. S. granted leave to file its petition for mandamus to vacate order directing petitioner to answer certain items of the Bill of Particulars by March 21, 1966 (also in 65 CR 432) ho

Clerk's Certificate to foregoing papers (omitted in printing).

[fol. 18]

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

VIO: Title 26, United States Code, Section 7206(1), Internal Revenue Code of 1954.

No. 65 CR 464

UNITED STATES OF AMERICA

v.

SIMMIE S. HORWITZ

INDICTMENT—Filed June 29, 1965

The June 1965 Grand Jury charges:

That on or about June 16, 1960, in the Northern District of Illinois, Eastern Division,

SIMMIE S. HORWITZ, defendant, did willfully and knowingly make and subscribe a 1959 United States Corporation Income Tax Return on behalf of Scott Pharmacy, Inc., 2459

West Devon Avenue, Chicago, Illinois, which was verified by a written declaration that it was made under the penalties of perjury, which return he did not believe to be true and correct as to every material matter in that it was stated in the said 1959 United States Corporation Income Tax Return that the gross sales were $68,522.97, whereas he then and there well knew and believed such statement was not true and correct in that Scott Pharmacy, Inc., Chicago, Illinois, had a large amount of additional gross sales during [fol. 19] the calendar year of 1959; in violation of Title 26, United States Code, Section 7206(1), Internal Revenue Code of 1954.

A True Bill:

.....

Foreman

.....

United States Attorney

RGS:sh

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

VIO: Title 26, United States Code, Section 7206(1), Internal Revenue Code of 1954.

No. 65 CR 432

UNITED STATES OF AMERICA

v.

SIMMIE S. HORWITZ

INDICTMENT—Filed June 15, 1965

The June 1965 Grand Jury charges:

That on or about June 16, 1959, in the Northern District of Illinois, Eastern Division,

SIMMIE S. HORWITZ, defendant, did willfully and knowingly make and subscribe a 1958 United States Corporation Income Tax Return on behalf of Scott Pharmacy, Inc., 2459 West Devon Avenue, Chicago, Illinois, which was verified by a written declaration that it was made under the penalties of perjury, which return he did not believe to be true and correct as to every material matter in that it was stated in the said 1958 United States Corporation Income Tax Return that the gross sales were $44,201.79, whereas he then and there well knew and believed such statement was not true and correct in that Scott Pharmacy, Incorporated, Chicago, Illinois had a large amount of additional gross [fol. 20] sales during the calendar year of 1958; in violation of Title 26, United States Code, Section 7206(1), Internal Revenue Code of 1954.

A True Bill:

.....

Foreman

.....

United States Attorney

IN THE UNITED STATES DISTRICT COURT

No. 65 CR 432

No. 65 CR 464

DEFENDANT'S MOTION IN THE ALTERNATIVE FOR BILL OF PARTICULARS—Filed September 7, 1965

Now Comes the Defendant, Simmie S. Horwitz, by and through his attorneys, Harris, Burman and Silets, and respectfully moves this Court in the alternative, if the Court denies the Defendant's Motion to Dismiss the Indictment, for the entry of an Order directing the United States to furnish the Defendant, in the captioned cases, with a Bill of Particulars as follows:

1. State what is the specific act or acts the Government alleges to have been committed by the Defendant in each of the years 1958 and 1959 in violation of Section 7206(1).

2. State what act or acts did the Defendant perform in order to "make" the United States Income Tax Return which are the subject of the captioned Indictments. Give the date and place of each such act.

3. State what act or acts did the Defendant perform in order to "subscribe" the United States Income Tax Returns which are the subject of the captioned Indictments. Give the date and place of each such act.

[fol. 21] 4. State with specificity what criminal act or acts were performed by the Defendant on June 16, 1959, as alleged in Indictment 65 CR 432.

5. State the alleged correct amount of the gross sales for Scott Pharmacy, Inc. for each of the years 1958 and 1959.

6. State respectively for each of the said years the amount and source of each and all of the items added to the reported gross sales in computing the amounts stated in answer to Request No. 5.

7. In describing the items requested in Request No. 6, state the date received, the gross amount, the name and address of from whom received, and the nature, amount and date paid, and the payee, date, and amount of any deductions allowed or allowable against the said gross amounts.

8. State the amount and source of each and all of the items of deduction allowed in computing the alleged correct amount of gross sales for each of the said years.

9. State the amount and source of each and all of the items of deduction disallowed in computing the alleged correct amount of gross sales for each of the years.

10. State whether the Government relies upon any books, records, documents or other papers of Scott Pharmacy,

Inc. obtained by the Internal Revenue Service. If so, state with specificity which such books, records, documents or other papers or portion thereof, when the same were obtained, where obtained, and by whom and from whom obtained.

11. State whether the Government will rely on proof upon the net worth, expenditures, bank deposits, or other theory or method of proof and, if so, whether said theory will be relied upon in whole or in part as corroborative of any other method of proof, including the specific receipt method. State also whether the said method of proof ap- [fol. 22] plies to proof of additional gross sales of the Corporation and/or income or other benefit to the Defendant.

12. In the event the Government has determined the unreported gross sales of the Corporation and/or income or benefit to the Defendant for either of the years upon the so-called net worth and/or expenditures method, then state the character and value of each asset owned by the Corporation and/or the Defendant, including the amount of cash on hand, on deposit, and receivables at the beginning and end of each of the said years covered by the Indictments.

13. In the event the Government has determined the unreported gross sales of the Corporation and/or income or benefit to the Defendant for either of the said years in reliance in whole or in part upon the so-called bank analysis or bank deposit method, list the bank accounts analyzed and itemize the deposits alleged to constitute unreported gross sales, setting forth the source, where known, deposits constituting transfers or redeposits and deposits conceded to be non-income items.

14. In the event the Government has determined the unreported gross sales of the Corporation and/or income or benefit to the Defendant for either of the years upon the specific item method, list each such item, including the

name and address of the payor, the date paid, the amount, and the disposition by the Corporation of each of such receipts.

15. State whether any of the alleged unreported gross sales was received directly, in each of the said years, by the Defendant, and, if so, identify the date and amount of such direct receipts.

16. State whether the alleged unreported gross sales in each of the said years was indirectly received by the Defendant and, if so, state the date, amount, and nature of such receipts.

[fol. 23] 17. State upon which line and page of each of the respective United States Income Tax Returns alleged in the Indictments there appears the material matter alleged to be believed by the Defendant as not true and correct.

18. Does the Government claim there are any other material matters contained in each of the respective U.S. Income Tax Returns alleged in the Indictments which are not true and correct and which the Defendant believed were not true and correct when he allegedly subscribed the said returns.

19. If the answer to Request No. 18 is in the affirmative, state as to each such material matter:

a. The nature thereof;

b. Wherein the same appears on the respective income tax return;

c. The correct material matter, including the amount and source, the date received or expended, and the payor or recipient thereof.

20. Is the Government now in possession of any books, papers, documents or tangible objects obtained from or belonging to the Defendant or obtained from others by seizure or by process.

21. If the answer to Request No. 20 is in the affirmative, state with particularity:

a. The nature and description of each such book, paper, document, or tangible object;

b. From whom obtained;

c. When obtained;

d. Whether the same was obtained by seizure or by process;

e. The nature of the process;

f. Whether the Government intends to rely on all or part of the said books, papers, documents, or tangible objects, and, if so, which part or parts, and for what purpose.

[fol. 24] 22. Does the Government rely upon any acts, including but not limited to the acts stated in the respective counts of the Indictments, performed by the Defendant to support the charge in the several counts of the Indictments that the Defendant made and subscribed a return which he did not believe to be true and correct as to every material matter.

23. If the answer to Request No. 22 is in the affirmative, state with respect to each such act, if there was more than one:

a. The nature of the act;

b. The date on which it was performed;

c. The place where it was performed; and

d. The names and addresses of persons, other than the Defendant, present when the act was performed.

24. Does the Government rely upon any oral statements of the Defendant to support the charge in the several counts of the Indictments.

25. If the answer to Request No. 24 is in the affirmative, state with respect to each such statement, if there was more than one:

a. The name and address of the person to whom the statement was made;

b. The date on which the statement was made;

c. The place where it was made;

d. The substance of the statement;

e. Whether the persons to whom the statement was made was a Government Agent at the time of the statement;

f. The names and addresses of any other persons present at the time the statement was made; and

g. Whether a written memorandum or verbatim transcript of the oral statement was made, and, if so, whether the Government has possession of the memorandum or transcript.

[fol. 25] 26. Does the Government rely upon any written statement of the Defendant to support the charge in the several counts of the Indictments.

27. If the answer to Request No. 26 is in the affirmative, state with respect to each such written statement, if there was more than one:

a. The date the written statement was made;

b. The names and addresses of the person or persons to whom the said written statement was given;

c. The substance of the written statement; and

d. Whether the statement is now in the possession of the Government.

28. Does the Government rely upon the statement of any person, other than the Defendant, to support the charge in the several counts of the Indictments.

29. If the answer to Request No. 28 is in the affirmative, state with respect to each such person, if there is more than one:

a. The name and address of each such person or persons; and

b. The substance of their statements.

30. State whether the Government will rely in full or in part on the truth or falsity of any personal United States Income Tax Returns filed by the Defendant. If so, state which returns and the particular matter contained therein upon which the Government will rely.

Conclusion

The Defendant respectfully represents that by reason of the adherence of the United States in this cause to bare statements of a purported offense in quasi-statutory language, and by reason of the absence from the Indictments of any details of the nature and cause of the accusations, he is unable to determine and know the nature and cause [fol. 26] of the accusations made against him. It is not possible for the Defendant to ascertain the exact nature of the offense charged against him inasmuch as the purported accusation is so vague and indefinite as to preclude him from ascertaining which of several statutes of the United States he is accused of violating. The Defendant respectfully asserts that the offense is so insufficiently identified so to make it impossible for him to plead a conviction or an acquittal thereon in bar of a possible second prosecution for the same offense, and, further, that he will

be unable to make adequate preparation of a defense against the purported charge or charges made against him by the pending Indictments.

Wherefore, it is requested that the Court order the United States Attorney, on behalf of the Plaintiff, United States Of America, to furnish a Bill of Particulars, in writing, informing the Defendant of the foregoing matters within such time as the Court considers appropriate.

Respectfully submitted,

....., Attorneys for Simmie S. Horwitz.

IN THE UNITED STATES DISTRICT COURT

65 CR 432, 65 CR 464

GOVERNMENT'S ANSWER TO DEFENDANT'S BILL OF PARTICULARS—Filed December 10, 1965

Now comes the United States of America by Edward V. Hanrahan, United States Attorney for the Northern District of Illinois, and in answer to the defendant's Bill of Particulars, states as follows:

1. State what is the specific act or acts the Government alleges to have been committed by the Defendant in each [fol. 27] of the years 1958 and 1959 in violation of Section 7206(1).

Answer:

The defendant willfully and knowingly made and subscribed to a 1958 and 1959 United States corporation income tax return to Scott Pharmacy, Inc., which he did not believe to be true and correct, in that he understated the gross sales, well knowing and believing the statement of gross sales was not true and correct.

2. State what act or acts did the Defendant perform in order to "make" the United States Income Tax Returns which are the subject of the captioned indictments. Give the date and place of each such act.

Answer:

The Government has analyzed the meaning of "make" in its Memorandum in Opposition to the Defendant's Motion to Dismiss Indictment 65 CR 432 on the grounds that the Statute of Limitations has run. Accordingly, the defendant "made" the returns when he filed the returns. The 1958 and 1959 returns were filed on June 16, 1959, and on June 16, 1960, respectively, at the office of the District Director of Internal Revenue Service, Chicago, Illinois.

3. State what act or acts did the Defendant perform in order to "subscribe" the United States Income Tax Returns which are the subject of the captioned Indictments. Give the date and place of each such act.

Answer:

The defendant "subscribed" to each return by signing his name thereon. The places and dates of such acts are unknown.

4. State with specificity what criminal act or acts were performed by the Defendant on June 16, 1959, as alleged in Indictment 65 CR 432.

[fol. 28] Answer:

Pursuant to Court order, the Government is not required to answer Question No. 4.

5. State the alleged correct amount of the gross sales for Scott Pharmacy, Inc. for each of the years 1958 and 1959.

Answer:

1958—$57,763.67

1959—$94,173.66

6. State respectively for each of the said years the amount and source of each and all of the items added to the reported gross sales in computing the amounts stated in answer to Request No. 5.

Answer:

1958—amount—$13,561.88
source—Sales of Scott Pharmacy, Inc.

1959—amount—$25,650.69
source—Sales of Scott Pharmacy, Inc.

7. In describing the items requested in Request No. 6, state the date received, the gross amount, the name and address of from whom received, and the nature, amount and date paid, and the payee, date, and amount of any deductions allowed or allowable against the said gross amounts.

Answer:

The deductions allowed or allowable against said amounts are those amounts reflected in the respective returns. See Government's Motion to vacate order of November 29, 1965 regarding receipts of gross income.

8. State the amount and source of each and all of the items of deduction allowed in computing the alleged correct amount of gross sales for each of the said years.

[fol. 29] Answer:

1958—amount—$19,180.52
source—1958 corporate income tax return of Scott Pharmacy, Inc.

1959—amount—$28,944.09
source—1959 corporate income tax return of Scott Pharmacy, Inc.

9. State the amount and source of each and all of the items of deduction disallowed in computing the alleged correct amount of gross sales for each of the years.

Answer:

None.

10. State whether the Government relies upon any books, records, documents or other papers of Scott Pharmacy, Inc. obtained by the Internal Revenue Service. If so, state with specificity which such books, records, documents or other papers or portion thereof, when the same were obtained, where obtained, and by whom and from whom obtained.

Answer:

The Government will rely, in whole or in part, on the following documents:

All records of prescriptions filled by Scott Pharmacy, Inc. from January, 1958, through December 31, 1960; customer file cards relating to all prescription sales during the period of January, 1958, through December 31, 1960; books and records of customer charge accounts for the years 1958, 1959, and 1960; records of accounts receivable and accounts payable for the years 1958, 1959, and 1960; all invoices, bills, documents, and letters relating to all purchases of all drugs, chemicals, powders, compounds, capsules, and all other supplies received by Scott Pharmacy from suppliers including, but not limited to, the fol- [fol. 30] lowing: Arthur Bennett; Bennett Pharmacy; Lapp Company, G. Baskett; Pacific Drug Distributors, Inc.; and Boyce Products, for the years 1958, 1959, and 1960; all records of all sales and all shipments of capsules, drugs,

supplies, and all pharmaceutical products by Scott Pharmacy, Inc. in the years 1958, 1959, and 1960; the corporate lilly book; all 1958, 1959, and 1960 daily cash register tapes, together with all cash register recap totals; all monthly sales recap totals; all 1958, 1959, and 1960 store receipt envelopes and contents; all records of loans made to and loans made by Scott Pharmacy, Inc., together with the notes, records of payments and records of repayments; all records of dividends paid by Scott Pharmacy, Inc.; all canceled checks, deposit slips and bank statements of all bank accounts used by Scott Pharmacy, Inc. during the years 1958, 1959, and 1960; the corporation minute book; all invoices for the years 1958, 1959, and 1960; recapitulation records of the expenses incurred before the Scott Pharmacy, Inc. began business; recapitulation of all records of income and expenses from the operation of Scott Pharmacy, Inc. to December 31, 1960; all accountant work papers for the years 1958, 1959, and 1960 of Scott Pharmacy, Inc.; and all books and records of the Scott Pharmacy, Inc. used directly or indirectly in the preparation of the 1958, 1959, and 1960 income tax returns for Scott Pharmacy, Inc.

The above items have been examined at Scott Pharmacy, Inc. and analyzed at the offices of the Internal Revenue Service throughout the investigation, beginning in October, 1960, and ending in 1963. The investigators were Special Agent Shadduck, Revenue Agent Neugebauer, and Revenue Agent Ansell. Some of the above documents were also delivered by Mr. Silets, attorney for the defendant, to the 1965 June Grand Jury. The remaining documents were obtained from corporate officers and agents.

[fol. 31] 11. State whether the Government will rely on proof upon the net worth, expenditures, bank deposits, or other theory or method of proof and, if so, whether said theory will be relied upon in whole or in part as corroborative of any other method of proof, including the specific receipt method. State also whether the said method of proof

applies to proof of additional gross sales of the Corporation and/or income or other benefit to the Defendant.

Answer:

The Government's theory of proof will rely upon corporation records corroborated by specific items and possibly by bank deposits. The Government does not understand the meaning of the last sentence of Question No. 11.

12. In the event the Government has determined the unreported gross sales of the Corporation and/or income or benefit to the Defendant for either of the years upon the so-called net worth and/or expenditures method, then state the character and value of each asset owned by the Corporation and/or the Defendant, including the amount of cash on hand, on deposit, and receivables at the beginning and end of each of the said years covered by the Indictments.

Answer:

The Government is not relying on the "so-called net worth and/or expenditures method."

13. In the event the Government has determined the unreported gross sales of the Corporation and/or income or benefit to the Defendant for either of the said years in reliance in whole or in part upon the so-called bank analysis or bank deposit method, list the bank accounts analyzed and itemize the deposits alleged to constitute unreported gross sales, setting forth the source, where known, deposits constituting transfers or redeposits and deposits conceded to be non-income items.

[fol. 32] Answer:

In its investigation to determine whether or not the Corporation had unreported gross sales for either of the years here in question, some partial analyses were made

by the Government of the checking account of the Corporation maintained at the Devon-North Town Bank, 2345 West Devon, Chicago, Illinois; the checking account of Simmie Horwitz and Arthur Bennett at the Devon-North Town Bank, 2345 West Devon, Chicago, Illinois; the checking account of Dorothy Horwitz at the Devon-North Town Bank, 2345 West Devon, Chicago, Illinois; the savings account of Dorothy Horwitz and Minna Rosen at the Cook County Federal Savings and Loan Association of Chicago, 2720 West Devon, Chicago, Illinois; the savings account of Sidney Horwitz and Dorothy Horwitz at the Community National Bank, Bal Harbour, Miami Beach, Florida; the account of Mrs. Dorothy Horwitz at the North Shore Bank, Miami Beach, Florida; and, of the account of Dorothy Horwitz and Minna Rosen at the Consumers National Bank of Chicago, 6401 Lincoln, Lincolnwood, Illinois.

These analyses have not been completed to the extent that an itemization of deposits which constitute unreported gross sales of the Corporation is available.

14. In the event the Government has determined the unreported gross sales of the Corporation and/or income or benefit to the Defendant for either of the years upon the specific item method, list each such item, including the name and address of the payor, the date paid, the amount, and the disposition by the Corporation of each of such receipts.

Answer:

See Government's Motion to Vacate Court Order of November 29, 1965.

[fol. 33] 15. State whether any of the alleged unreported gross sales was received directly, in each of the said years, by the Defendant, and, if so, identify the date and amount of such direct receipts.

Answer:

Assuming "directly" means personally received, the Government does not know the exact date and exact amounts of any receipts of unreported gross sales by the defendant.

16. State whether the alleged unreported gross sales in each of the said years was indirectly received by the Defendant and, if so, state the date, amount, and nature of such receipts.

Answer:

The Government does not know what is meant by "indirectly" received and is, therefore, unable to answer the question.

17. State upon which line and page of each of the respective United States Income Tax Returns alleged in the Indictments there appears the material matter alleged to be believed by the Defendant as not true and correct.

Answer:

1958—Page two, line one.

1959—Page one, line one.

18. Does the Government claim there are any other material matters contained in each of the respective U.S. Income Tax Returns alleged in the Indictments which are not true and correct and which the Defendant believed were not true and correct when he allegedly subscribed the said returns.

Answer:

All of the necessary recomputations which follow from an understatement of gross income.

[fol. 34] 19. If the answer to Request No. 18 is in the affirmative, state as to each such material matter:

a. The nature thereof;

b. Wherein the same appears on the respective income tax return;

c. The correct material matter, including the amount and source, the date received or expended, and the payor or recipient thereof.

Answer:

See answer to Question No. 18.

20. Is the Government now in possession of any books, papers, documents or tangible objects obtained from or belonging to the Defendant or obtained from others by seizure or by process.

Answer:

The Government has no books or records belonging to the defendant. It is in possession of the Corporate Minute Book.

21. If the answer to Request No. 20 is in the affirmative, state with particularity:

a. The nature and description of each such book, paper, document, or tangible object;

b. From whom obtained;

c. When obtained;

d. Whether the same was obtained by seizure or by process;

e. The nature of the process;

f. Whether the Government intends to rely on all or part of the said books, papers, documents, or tangible objects, and, if so, which part or parts, and for what purpose.

[fol. 35] Answer:

The book was obtained by grand jury subpoena from Harry Freeman. The Government has not determined whether or not or how it will rely upon the book.

22. Does the Government rely upon any acts, including but not limited to the acts stated in the respective counts of the Indictments, performed by the Defendant to support the charge in the several counts of the Indictments that the Defendant made and subscribed a return which he did not believe to be true and correct as to every material matter.

Answer:

Yes.

23. If the answer to Request No. 22 is in the affirmative, state with respect to each such act, if there was more than one:

a. The nature of the act;

b. The date on which it was performed;

c. The place where it was performed; and

d. The names and addresses of persons, other than the Defendant, present when the act was performed.

Answer:

23(a). In addition to the Government's answer to questions one, two and three of this bill of particulars, the defendant kept and maintained fraudulent corporate records, destroyed and seereted corporate records, impeded the Internal Revenue investigation and benefited from the receipt of unreported receipts of Scott Pharmacy, Inc.

23(b). Unknown, except as stated in answers to questions one, two, and three of this Bill of Particulars.

23(c). Unknown, except as stated in answers to questions one, two, and three of this Bill of Particulars.

[fol. 36] 23(d). Clifford Shadduck, Harry Ansell and Neugebauer were present when the Defendant attempted to impede investigation. Other names are unknown.

24. Does the Government rely upon any oral statements of the defendant to support the charge in the several counts of the Indictments.

Answer:

See Government's Motion to Vacate Court Order of November 29, 1965.

25. If the answer to Request No. 24 is in the affirmative, state with respect to each such statement, if there was more than one:

a. The name and address of the person to whom the statement was made;

b. The date on which the statement was made;

c. The place where it was made;

d. The substance of the statement;

e. Whether the persons to whom the statement was made was a Government Agent at the time of the statement;

f. The names and addresses of any other persons present at the time the statement was made; and

g. Whether a written memorandum or verbatim transcript of the oral statement was made, and, if so, whether the Government has possession of the memorandum or transcript.

Answer:

See Government's Motion to Vacate Court Order of November 29, 1965.

26. Does the Government rely upon any written statement of the Defendant to support the charge in the several counts of the Indictments.

[fol. 37] Answer:

No.

27. If the answer to Request No. 26 is in the affirmative, state with respect to each such written statement, if there was more than one:

a. The date the written statement was made;

b. The names and addresses of the person or persons to whom the said written statement was given;

c. The substance of the written statement; and

d. Whether the statement is now in the possession of the Government.

Answer:

See answer to Question No. 26.

28. Does the Government rely upon the statement of any person, other than the Defendant, to support the charge in the several counts of the Indictments.

Answer:

See Government's Motion to Vacate Court Order of November 29, 1965.

29. If the answer to Request No. 28 is in the affirmative, state with respect to each such person, if there is more than one:

a. The name and address of each such person or persons; and

b. The substance of their statements.

Answer:

29(a). See Government's Motion to Vacate Court Order of November 29, 1965.

29(b). Pursuant to Court order, the Government is not required to answer Question No. 29(b).

30. State whether the Government will rely in full or in part on the truth or falsity of any personal United [fol. 38] States Income Tax Returns filed by the Defendant. If so, state which returns and the particular matter contained therein upon which the Government will rely.

Answer:

The Government is relying on the 1958 and 1959 individual income tax returns of the defendant, in which he has understated his gross income received in the years 1958, 1959 and 1960.

Respectfully submitted,

Edward V. Hanrahan, United States Attorney.

IN THE UNITED STATES DISTRICT COURT

No. 65 CR 432—65 CR 464

AMENDED BILL OF PARTICULARS—Filed January 4, 1966

Now comes the United States of America by Edward V. Hanrahan, United States Attorney for the Northern District of Illinois, and amends its Bill of Particulars previously filed in the above cases and states as follows:

7. In describing the items requested in Request No. 6, state the date received, the gross amount, the name and address of from whom received, and the nature, amount and date paid, and the payee, date, and amount of any

deductions allowed or allowable against the said gross amounts.

Answer:

In describing the items requested in Request No. 6, the dates received and the gross amounts are as follows:

[fol. 39]

Date Received	Unreported Gross Receipts
October 6, 1958	$ 200.00
October 13, 1958	100.00
October 18, 1958	100.00
October 20, 1958	200.00
October 21, 1958	31.00
October 22, 1958	100.00
October 23, 1958	100.00
October 25, 1958	100.00
October 27, 1958	200.32
October 29, 1958	135.94
October 30, 1958	50.00
October 31, 1958	50.00
November 3, 1958	177.11
November 4, 1958	49.92
November 5, 1958	50.00
November 6, 1958	99.74
November 7, 1958	46.45
November 10, 1958	240.00
November 12, 1958	40.00
November 13, 1958	100.00
November 14, 1958	140.00
November 15, 1958	75.00
November 17, 1958	300.00
November 19, 1958	50.00
November 20, 1958	50.00
November 21, 1958	50.00
November 22, 1958	100.00
November 24, 1958	222.09

Date Received	Unreported Gross Receipts
November 25, 1958	50.00
November 26, 1958	50.00
November 28, 1958	95.00
November 29, 1958	100.00
[fol. 40]	
December 1, 1958	200.00
December 2, 1958	50.00
December 3, 1958	50.00
December 4, 1958	75.00
December 5, 1958	60.00
December 6, 1958	100.00
December 8, 1958	102.25
December 9, 1958	50.00
December 10, 1958	50.00
December 11, 1958	100.00
December 12, 1958	50.00
December 13, 1958	100.00
December 15, 1958	100.00
December 16, 1965	150.00
December 17, 1965	50.39
December 18, 1958	150.00
December 19, 1958	50.00
December 20, 1958	80.00
December 22, 1958	174.78
December 24, 1958	100.00
December 26, 1958	100.00
December 27, 1958	200.00
December 29, 1958	195.03
January 2, 1959	$ 50.00
January 3, 1959	199.59
January 5, 1959	200.00
January 6, 1959	100.00
January 7, 1959	100.00
January 8, 1959	100.00
January 9, 1959	100.00
January 10, 1959	100.00

	Date Received	Unreported Gross Receipts
	January 12, 1959	100.00
[fol. 41]		
	January 13, 1959	100.00
	January 14, 1959	25.00
	January 15, 1959	60.00
	January 16, 1959	50.00
	January 17, 1959	100.00
	January 19, 1959	100.00
	January 20, 1959	50.00
	January 24, 1959	200.00
	January 26, 1959	100.00
	January 28, 1959	100.00
	January 29, 1959	50.00
	January 30, 1959	100.00
	January 31, 1959	200.00
	February 2, 1959	200.00
	February 4, 1959	125.00
	February 5, 1959	50.00
	February 6, 1959	50.00
	February 9, 1959	100.00
	February 12, 1959	186.69
	February 13, 1959	60.00
	February 14, 1959	50.00
	February 16, 1959	100.00
	February 17, 1959	100.00
	February 18, 1959	50.00
	February 19, 1959	60.00
	February 20, 1959	150.00
	February 21, 1959	50.00
	February 23, 1959	75.00
	February 24, 1959	100.00
	February 25, 1959	50.00
	February 26, 1959	100.00
	April 1, 1959	93.00
[fol. 42]		
	April 6, 1959	50.00

Date Received	Unreported Gross Receipts
April 7, 1959	100.00
April 8, 1959	$ 100.00
April 9, 1959	50.00
April 10, 1959	50.00
April 11, 1959	75.00
April 13, 1959	100.00
April 14, 1959	50.00
April 16, 1959	100.00
April 17, 1959	100.00
April 18, 1959	300.00
April 20, 1959	200.00
April 21, 1959	25.00
April 24, 1959	50.00
April 25, 1959	50.00
April 27, 1959	150.00
April 28, 1959	25.00
April 30, 1959	100.00
May 2, 1959	100.00
May 4, 1959	200.00
May 5, 1959	400.00
May 7, 1959	100.00
May 8, 1959	100.00
May 9, 1959	50.00
May 11, 1959	300.00
May 12, 1959	100.00
May 14, 1959	100.00
May 15, 1959	100.00
May 16, 1959	100.00
May 19, 1959	75.00
May 20, 1959	50.00
May 28, 1959	100.00
[fol. 43]	
June 11, 1959	50.00
June 24, 1959	120.00
June 25, 1959	100.00

Date Received	Unreported Gross Receipts
July 1, 1959	100.00
July 2, 1959	100.00
July 3, 1959	154.00
July 6, 1959	300.00
July 7, 1959	49.60
July 9, 1959	50.00
July 10, 1959	50.00
July 11, 1959	200.00
July 13, 1959	50.00
July 14, 1959	100.00
July 16, 1959	190.00
July 17, 1959	150.00
July 18, 1959	120.00
July 20, 1959	80.00
July 23, 1959	150.00
July 24, 1959	125.00
July 25, 1959	100.00
July 27, 1959	80.00
July 30, 1959	108.00
July 31, 1959	150.00
August 1, 1959	52.00
August 3, 1959	124.98
August 4, 1959	89.82
August 5, 1959	98.00
August 6, 1959	152.00
August 7, 1959	110.00
August 8, 1959	100.00
August 10, 1959	200.00
August 11, 1959	122.92
August 13, 1959	150.00
[fol. 44]	
August 14, 1959	1.00
August 15, 1959	40.00
August 17, 1959	298.00
August 20, 1959	150.00
August 21, 1959	25.00

Date Received	Unreported Gross Receipts
August 22, 1959	50.00
August 24, 1959	250.00
August 26, 1959	40.00
August 27, 1959	100.00
August 29, 1959	250.00
August 31, 1959	240.76
September 1, 1959	25.00
September 3, 1959	200.00
September 5, 1959	50.00
September 8, 1959	200.00
September 9, 1959	190.00
September 10, 1959	76.00
September 11, 1959	173.65
September 12, 1959	125.00
September 14, 1959	200.00
September 17, 1959	103.06
September 18, 1959	90.00
September 19, 1959	247.00
September 21, 1959	100.00
September 22, 1959	100.00
September 24, 1959	85.00
September 25, 1959	40.00
September 26, 1959	125.00
September 28, 1959	85.00
September 29, 1959	150.00
October 1, 1959	225.00
October 2, 1959	75.00
[fol. 45]	
October 5, 1959	250.00
October 6, 1959	50.00
October 7, 1959	50.54
October 8, 1959	200.00
October 9, 1959	25.00
October 10, 1959	199.40
October 13, 1959	400.00

Date Received	Unreported Gross Receipts
October 15, 1959	300.00
October 16, 1959	100.00
October 17, 1959	100.00
October 19, 1959	150.00
October 22, 1959	50.00
October 23, 1959	225.00
October 24, 1959	70.00
October 26, 1959	100.00
October 27, 1959	125.00
October 28, 1959	50.00
October 29, 1959	150.00
October 30, 1959	59.82
October 31, 1959	150.00
November 2, 1959	100.00
November 3, 1959	150.00
November 4, 1959	125.00
November 5, 1959	125.00
November 6, 1959	90.00
November 7, 1959	50.00
November 9, 1959	150.00
November 10, 1959	50.00
November 11, 1959	50.00
November 12, 1959	100.00
November 13, 1959	45.00
November 14, 1959	150.00
November 16, 1959	150.00
[fol. 46]	
November 18, 1959	200.00
November 19, 1959	100.00
November 20, 1959	80.00
November 21, 1959	94.00
November 23, 1959	84.00
November 25, 1959	60.00
November 27, 1959	100.00
November 30, 1959	240.00

Date Received	Unreported Gross Receipts
December 1, 1959	110.00
December 2, 1959	100.00
December 3, 1959	90.00
December 4, 1959	200.00
December 5, 1959	200.00
December 7, 1959	300.00
December 8, 1959	150.00
December 10, 1959	150.00
December 11, 1959	70.00
December 14, 1959	200.00
December 15, 1959	50.00
December 16, 1959	100.00
December 18, 1959	150.00
December 17, 1959	200.00
December 19, 1959	200.00
December 21, 1959	150.00
December 24, 1959	40.00
December 26, 1959	125.00
December 28, 1959	100.00
December 31, 1959	100.00

[fol. 47] The dates upon which the balances of the unreported gross receipts were received are not known. The Government does not know the names and addresses of those persons from whom the above understated gross receipts were received.

The deductions allowed or allowable against said amounts are those amounts reflected in the respective corporate income tax returns.

14. In the event the Government has determined the unreported gross sales of the Corporation and/or income or benefit to the Defendant for either of the years upon the specific item method, list each such item, including the name and address of the payer, the date paid, the amount, and the disposition by the Corporation of each of such receipts.

Answer:

The Government respectfully declines to answer Request No. 14.

23. If the answer to Request No. 22 is in the affirmative, state with respect to each such act, if there was more than one:

a. The nature of the act;

b. The date on which it was performed;

c. The place where it was performed; and

d. The names and addresses of persons, other than the Defendant, present when the act was performed.

Answer:

23(a). In addition to the Government's answers to Requests No. 1, 2, and 3 of this Bill of Particulars, the defendant kept and maintained fraudulent corporate records, destroyed and secreted corporate records, secreted currency, impeded the Internal Revenue investigation, and [fol. 48] benefited from the receipt of unreported receipts of Scott Pharmacy, Inc.

23(b). Unknown, except as stated in answers to Requests No. 1, 2, and 3 of this Bill of Particulars.

23(c). Unknown, except as stated in answers to Requests No. 1, 2, and 3 of this Bill of Particulars and with respect to the secreting of currency and to the impeding of the investigation, said acts were performed on the premises of Scott Pharmacy, Inc., 2459 West Devon Avenue, Chicago, Illinois.

23(d). Special Agent Shadduck, Revenue Agent Ansell, and Revenue Agent Neugebauer were present when the defendant attempted to impede the investigation. Other names are unknown.

24. Does the Government rely upon any oral statements of the defendant to support the charge in the several counts of the Indictments.

Answer: Yes.

25: If the answer to Request No. 24 is in the affirmative, state with respect to each such statement, if there was more than one:

a. The name and address of the person to whom the statement was made;

b. The date on which the statement was made;

c. The place where it was made;

d. The substance of the statement;

e. Whether the persons to whom the statement was made was a Government Agent at the time of the statement;

f. The names and addresses of any other persons present at the time the statement was made; and

g. Whether a written memorandum or verbatim transcript of the oral statement was made, and, if no, whether the Government has possession of the memorandum or transcript.

[fol. 49] Answer:

The Government respectfully declines to answer Request No. 25(a), 25(b), 25(c), 25(e), 25(f), and 25(g). The Government has not been required to answer Request No. 25(d).

28. Does the Government rely upon the statement of any person, other than the Defendant, to support the charge in the several counts of the Indictments.

Answer:

Yes.

29. If the answer to Request No. 28 is in the affirmative, state with respect to each such person, if there is more than one:

a. The name and address of each such person or persons; and

b. The substance of their statements.

Answer:

The Government respectfully declines to answer Request No. 29(a). The Government has not been required to answer Request No. 29(b).

Respectfully submitted,

Edward V. Hanrahan, United States Attorney.

RAG:sjh

IN THE UNITED STATES DISTRICT COURT

Nos. 65 CR 432 & 65 CR 464

GOVERNMENT'S ANSWER TO ITEM 14 OF THE DEFENDANT'S BILL OF PARTICULARS—Filed March 14, 1966

Now comes the United States of America by Edward V. Hanrahan, United States Attorney for the Northern [fol. 50] District of Illinois and in answer to item 14 of the defendant's bill of particulars states as follows:

14. In the event the Government has determined the unreported gross sales of the Corporation and/or income or benefit to the Defendant for either of the years upon the specific item method, list each such item, including the name and address of the payor, the date paid, the amount, and the disposition by the Corporation of each of such receipts.

Answer:

The government's proof by method of specific item is predicated upon the record of sales of Scott Pharmacy, Inc., supplemented by specific sales not fully included in the sales records of the corporation. To list the specific sales as recorded in the corporation's records would require listing each sale of Scott Pharmacy as recorded in its records for the years 1958 and 1959. Since the total number of individual sales is probably in excess of 25,000 it would be burdensome and of no useful purpose to itemize each and every sale recorded in the corporation records. Unless the defendant requests and the court orders the government to make such a list itemizing the record sales of Scott Pharmacy, Inc., the government will only set forth in the attached appendix the specific items of sales which are not properly reflected in the records of Scott Pharmacy, Inc., and will be proven by testimony of the customer of Scott Pharmacy, Inc. The disposition of the corporation of any of the receipts by the following individuals is unknown.

Edward V. Hanrahan, United States Attorney.

RGS:mld:sjh

[fol. 51]

APPENDIX TO GOVERNMENT'S ANSWER

Rt. No.	Name	Address	Date Paid & Amount	Total Amount to Wide Ho Fisheries Mill Portsiz (1998) (1999)
613	Sara Stokes	3139 Hill Lane, Wilmette, Ill.	10-15-98 15.37	
			11-13-98 13.02	
			9-15-98 13.02	
			10-8-98 14.14	
			10-29-98 13.02	
			12-1-98 15.12	
			1-7-99 15.31	
			3-1-99 15.12	
			4-28-99 20.04	
			7-29-99 13.14	
			9-1-99 20.04	
			11-16-99 13.72	

Ex. No.	Name	Address	Date Paid & Amount	Total Amount to Which the Witness Will Testify (1958) (1959)
			3/23/59 $ 15.12	
			4/3/59 15.12	
			5/28/59 15.12	
			7/10/59 16.87	
			7/28/59 15.12	
			9/1/59 15.12	
			10/26/59 16.87	
			12/7/59 30.24	

Ext No.	Name	Address	Date Paid & Amount	Total Amount to Which the Witness Will Testify (1958)	(1959)
			4/16/59 $ 7.61		
			4/23/59 7.61		
			4/30/59 7.61		
			5/7/59 7.61		
			5/14/59 7.61		
			5/21/59 7.61		
			5/28/59 7.61		
			6/4/59 7.61		
			6/11/59 7.61		
			6/17/59 7.61		
			6/18/59 1.50		
			7/16/59 6.51		
			7/31/59 7.61		
			8/6/59 7.61		
			8/13/59 7.61		
			8/20/59 7.61		
			8/27/59 15.12		
			9/13/59 15.12		
			9/26/59 15.12		
			10/10/59 15.12		
			11/25/59 15.12		
			12/9/59 15.12		
			12/26/59 15.12		
5-31	Lillian Kahn	6335 N. Bell Ave. Chicago, Illinois	11/25/58 6.60		
			12/2/58 7.56		
			12/9/58 7.56		
			12/18/58 8.56		
			12/26/58 15.12		
			1/8/59 15.12		
			1/24/59 15.12		
			2/11/59 15.12		
			3/3/59 13.02		

[fol. 54]

Bis. No.	Name	Address	Date Paid & Amount	Total Amount to Which the Witness Will Testify (1958) (1959)
1835	Crayton M. Stobel	8529 Saturn Street Los Angeles, California	4/5/58 $ 5.20 4/19/58 3.66 4/26/58 5.76 5/17/58 12.00 6/16/58 6.00 11/3/58 7.56 12/1/58 15.12 8/28/58 4.90 8/21/58 6.51 8/12/58 6.71 7/31/58 6.51 7/24/58 10.00 7/16/58 10.51 6/30/58 6.12 6/9/58 6.06 5/24/58 6.06 5/10/58 6.06 4/12/58 6.16 5/2/58 6.06	
3874	Charles Kemmerer	1904 S. Prospect Ave. Park Ridge, Illinois	1/21/59 7.61 1/28/59 7.61 2/5/59 7.61 2/12/59 7.61 2/19/59 7.61 2/26/59 7.61 3/5/59 7.61 3/12/59 7.61 3/19/59 10.40 3/26/59 7.61 4/2/59 7.91 4/9/59 7.61	

[fol. 55]

Ex. No.	Name	Address	Date Paid & Amount		Total Amount to which the witness will testify 1958	1959
2490	Libby Hadler	6228 Whipple Street Chicago, Illinois	Unknown		60.00	125.00
2868	Herman A. Goldberg	3950 Lake Shore Drive Chicago, Illinois	"		30.00	
3516	Clarence Payne	7922 South Long Oak Lawn, Illinois	10-13-59	$60.48		
			11-23-59	28.14		
			12- 3-59	28.14		
			12-21-59	15.40		
2244	Gertrude Becker	6745 Mozart Chicago, Illinois	10-27-58	7.56		
			11-14-58	7.56		
			12-22-58	15.46		
			1-30-59	15.12		
			2-17-59	22.68		
1695	Gail Icho	7626 North Greenview Chicago, Illinois	1-13-59	10.92	130.50	
			2-14-59	6.72		
			4- 1-59	10.05		
			5-25-59	7.00		
			7-11-59	15.12		
			9- 1-59	17.64		
			12-16-59	21.84		

Bk. No.	Name	Address	Date Paid & Amount	Total Amount to Which The Alliance Will Subscribe (1998)	
b298	Estelle Siegel	8819 S. Crawford Skokie, Illinois	8-08-97 $ 7.95 3-03-98 7.95 7-11-98 8.12 7-07-99 13.51	$ 84.00	$ 48.00
8876	Ethel Levin	7250 S. Western Chicago, Illinois	Unknown	37.06	34.98
8897	Pearl Gold	8733 W. Berwyn Chicago, Illinois	"		
9813	George Zaremba	Warwick Apts. Atlantic City, N.J.	"		89.00
9814	Blanche Zaremba	Warwick Apts. Atlantic City, N.J.	"		89.00
8818	Muriel Horwitz	3906 Lake Street Skokie, Illinois	"	146.50	146.50
1602	Vivian Primerhein	6153 N. Lawndale Chicago, Illinois	"	90.00	90.00
1736	Gloria Tunick	3295 W. Arcadia Skokie, Illinois	"	86.00	86.00
3136	Hilda Rhinow	644 Oakdale Chicago, Illinois	10-06-99 19.18	179.80	
8865	Ronald Mikkelsen	9589 N. Grand Pk. Mt. Rokie, Ill.	Unknown	157.80	171.80
8876	Barbara Hisky	6097 N. Troy Chicago, Illinois	"	196.98	
8881	Elizabeth Cohen	8310 Kimball Skokie, Illinois	"		49.18
8882	Sylvia Freedberg	3917 Jarvis Chicago, Illinois	"		86.48

[fol. 57]

IN THE UNITED STATES DISTRICT COURT

Name of Presiding Judge, Honorable Hubert L. Will.

Cause No. 65 CR 464

U.S.A.

vs.

SIMMIE S. HORWITZ

ORDERS—November 29, 1965

Brief Statement of Motion—Ruling on pending motions and to set trial.

Notes—Order defendant's motions to dismiss the indictment denied.

Order defendant's motion for a bill of particulars granted, except as to particulars 4 and 29(b).

Order cause set for Jan. 3, 1966 at 2:00 P.M. to set trial.

IN THE UNITED STATES DISTRICT COURT

Name of Presiding Judge, Honorable Hubert L. Will.

Cause No. 65 CR 464

UNITED STATES OF AMERICA

v.

SIMMIE S. HORWITZ

ORDERS—December 3, 1965

Brief Statement of Motion—Motion to vacate court order of November 29, 1965 and grant leave to the government to file a memorandum in support of its motion.

Names and Addresses of moving counsel—Edward V. Hanrahan (R. G. Schultz), United States Attorney, 1500 Federal Office Building, 219 South Dearborn Street, Chicago, Illinois 60604

Names and Addresses of other counsel entitled to notice and names of parties they represent—Harvey M. Silets, 8 South Dearborn Street, Chicago, Illinois—Defendant

[fol. 58] Notes—Govt's motion to vacate court order of Nov. 29, 1965 and memorandum in support taken under advisement.

In the United States District Court

Name of Presiding Judge, Honorable Hubert L. Will.

No. 65 CR 432 & 65 CR 464

U.S.A.

vs.

Simmie S. Horwitz

Orders—December 7, 1965

Notes—Pursuant to memorandum opinion this day filed order Govt's motion to vacate certain portions of this Court's order of Nov. 29, 1965 denied with the exception of question 25(d).

IN THE UNITED STATES DISTRICT COURT

Name of Presiding Judge, Honorable Hubert L. Will.

No. 65 CR 432 & 65 CR 464

UNITED STATES OF AMERICA

vs.

SIMMIE S. HORWITZ

ORDERS—January 4, 1966

Brief Statement of Motion—Motion to dismiss Indictments.

Names and Addresses of moving counsel—Harvey M. Silets, Harris, Burman and Silets, 7 South Dearborn Street, Chicago, Illinois 60603

Representing—Simmie S. Horwitz

Names and Addresses of other counsel entitled to notice and names of parties they represent—United States Attorney, 219 South Dearborn Street, Chicago, Illinois Representing United States of America

[fol. 59] Notes—Defendant's motion to dismiss the indictments entered and contd to March 7, 1966 at 10:00 A.M.

IN THE UNITED STATES DISTRICT COURT

Name of Presiding Judge, Honorable Hubert L. Will.

No. 65 CR 464

U.S.A.

vs.

SIMMIE S. HORWITZ

ORDERS—March 7, 1966

Brief Statement of Motion—Motion for entry of an order directing the Govt. to furnish particulars, or, in the alternative, to dismiss indictment and to set trial.

Notes—Order Govt. to answer questions 14 and 25 of defendant's motion for bill of particulars, as originally requested, within 1 week. Order cause contd to March 14, 1966 at 10:00 A.M. to set trial.

IN THE UNITED STATES DISTRICT COURT

Name of Presiding Judge, Honorable Hubert L. Will.

No. 65 CR 464

U.S.A.

vs.

SIMMIE S. HORWITZ

ORDERS—March 14, 1966

Brief Statement of Motion—To set trial.

Notes—Govt refuses to answer question No. 25 of the defendant's motion for bill of particulars, as limited and as ordered by the Court. Defendant renews motion to dismiss the indictment and ruling on said motion reserved. Order cause contd to March 15, 1966 at 10:00 A.M.

[fol. 60]

IN THE UNITED STATES DISTRICT COURT

Name of Presiding Judge, Honorable Hubert L. Will.

No. 65 CR 464

U.S.A.

vs.

SIMMIE S. HORWITZ

ORDERS—March 15, 1966

Brief Statement of Motion—Deft's motion to dismiss indictment contd generally.

Notes—Enter order.

IN THE UNITED STATES DISTRICT COURT

Name of Presiding Judge, Honorable Hubert L. Will.

No. 65 CR 432

U.S.A.

vs.

SIMMIE S. HORWITZ

ORDER—March 15, 1966

Brief Statement of Motion—Deft's motion to dismiss indictment contd generally.

Notes—Enter order.

Will, J.

[fol. 61]

IN THE UNITED STATES DISTRICT COURT

No. 65 CR 432—65 CR 464

MEMORANDUM OPINION—December 7, 1965

The United States has moved to vacate certain portions of this Court's order of November 29 granting, with exceptions, defendant's motion for a Bill of Particulars. The government contends that our decision as to Questions 7, 14, 25, 28 and 29(a) is erroneous in the belief that it requires them to furnish a list of witnesses to the defendant and to divulge the whole of its case before trial. The government's characterization of our order is an overstatement and its suggestion that disclosure of the particulars sought will somehow prejudice the prosecution and defeat the interests of justice appears unfounded. With the exception of Question 25(d), which was inadvertently included in our prior order, the government's motion will be denied.

The proper scope of a bill of particulars is a question left largely to the sound discretion of the trial judge. Wong Tai v. United States, 273 U.S. 77, 82 (1927). See also, this court's opinion in United States v. Covelli, 210 F.Supp. 589 (N.D. Ill. 1962). The exercise of judicial discretion—in such matters as in all others—is necessarily shaped by the central elements of our system of justice. Contrary to the government's suggestion, the right of the defendant to remain silent and to have his guilt proved beyond a reasonable doubt does not generate a countervailing right which permits the prosecution to withhold information which the defendant requires in the preparation of his defense. The scales of justice are not balanced in such a manner. Rather, they are set to achieve a single, [fol. 62] all-important result: a fair trial in which the true facts can be ascertained.

Each of the questions the government seeks to strike ask for certain relevant names. The two indictments here

involved charge that the gross sales amount stated on certain tax returns subscribed by the defendant is incorrect. Question 7 asks the government to identify the various elements of their computation of gross sales, including the names of the various payors. Question 14 is similar, although particularly restricted to the possible use of the specific item method as the technique for determining unreported gross sales. Depending on the techniques actually used by the government, the answers to these questions may or may not be repetitious. They are, however, essential to identify the specific information the defendant will be called upon to answer and the problem of duplication is one easily cured by competent drafting. Question 25 deals with oral statements which the defendant is alleged to have made. The government is not required to disclose the substance of these conversations, but only the name of the person to whom the statement was made and the names of others actually present at the time. Question 28 asks if the government relies upon statements of persons other than the defendant and, if the answer is in the affirmative, 29(a) requests their names.

It is by no means clear that the names thus provided will be a list of witnesses to be called by the prosecution. That some may be called is obvious. However, it is equally obvious that not all must necessarily be called and customarily are not. Also equally obvious is the fact that others besides persons present at such times may be called as witnesses as, for example, agents who investigated transactions involving the defendant by interviewing the other parties thereto, accounting witnesses who testify to [fol. 63] computations made by them, etc. The reason for requiring disclosure of their names, however, is not that they will or may be witnesses, but that the defendant requires identification of the times, places and persons present in order to prepare his defense. Moreover, if the government has any basis for contending that such disclosure will involve physical risk to the individuals or prejudice the government in its ability to produce its evidence, they

have not so indicated. Absent such a showing, the defendant is entitled to have the information.

Moreover, with respect to the information underlying the government's analysis of economic data for such as gross sales, the notion that supplying the names of payors is the equivalent of a list of witnesses ignores the existence of modern trial techniques which simplify the presentation of such evidence. There will, of course, be instances where the identity of a party to the transaction will be of importance to the prosecution or defense and the individual's testimony essential to determine the nature of the transaction. However, in general, the bulk of such evidence is drawn from business records and accounts whose authenticity and substance is subject to stipulation between prosecution and defense. The uncontested testimony of numerous clerical employees, necessary merely to lay a foundation for the evidence, does not assist the trier of fact in reaching the correct determination of the ultimate issues. It more often obscures and delays, withdrawing the focus of attention from the central questions to be decided. Needless to say, such matters cannot be considered for inclusion in pretrial stipulations if they are withheld until the moment of trial.

Lest there be any misunderstanding, the court does not intend to require the government to specify the substance of its evidence or limit the scope of its proof at a subse- [fol. 64] quent trial. Counsel for the defense in the motion for a bill of particulars makes frequent use of the phrase "on which the government relies" or variations thereof. The court does not interpret this as seeking a disclosure of all the government's proof but simply to identify the information sought as that which the government deems relevant and material rather than all such information in the government's possession.

An order consistent with this opinion will be entered.

Hubert L. Will, Judge.

Dated: December 7, 1965

[fol. 65]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Before Hon. John S. Hastings, Chief Judge, Hon. F. Ryan Duffy, Circuit Judge, Hon. Luther M. Swygert, Circuit Judge.

[Title omitted]

RULE TO SHOW CAUSE—March 24, 1966

On June 15, 1965, indictment No. 65 Cr 432 was returned to the District Court for the Northern District of Illinois, charging Simmie S. Horwitz with a violation of Title 26 U. S. Code § 7206(1);

On June 29, 1965, indictment No. 65 Cr 464 was returned to the District Court for the Northern District of Illinois, charging Simmie S. Horwitz with a similar but distinct violation of Title 26 U. S. Code, § 7206 (1). At subsequent proceedings, these two indictments have been considered on a consolidated basis;

On September 7, 1965, defendant filed a motion in the alternative for a bill of particulars. Thereafter, the Government filed an answer in opposition to defendant's motion for a bill of particulars;

On November 29, 1965, the District Court entered an order granting defendant's motion for a bill of particulars except as to 4 and 29(b);

On December 3, 1965, the Government filed a motion to vacate the Court's order of November 29, 1965, with respect to particulars 7, 14, 25, 28 and 29(a). This motion was denied, and the Government has filed answer to all questions contained in defendant's bill of particulars as directed by [fol. 66] the Court except questions 25 (a) (b) (c) (e) (f) and (g):

On March 15, 1966, on petition of the Government, this Court granted a stay of all proceedings until further order of the Court and granted the government leave to file its petition for mandamus to vacate the District Court's order directing the Government to answer certain items of the bill of particulars by March 21, 1966;

Petitioner, United States of America, citing *Bowman Dairy* v. *United States*, 341 U.S. 214, *Atlass* v. *Miner*, 7 Cir., 265 F.2d 312, 319 and *Miner* v. *Atlass*, 363 U.S. 461, and claiming the District Court has attempted to extend criminal discovery beyond the provisions of the Federal Rules of Criminal Procedure and the law, and protesting that under established law, the Government need not disclose a list of its witnesses to the defendant in advance of trial, has requested this Court to issue a writ of mandamus directed to Honorable Hubert L. Will, Judge of the United States District Court for the Northern District of Illinois, who signed the orders hereinbefore described;

And the Court being fully advised;

It Is Ordered, that the said Honorable Hubert L. Will, Judge of the United States District Court for the Northern District of Illinois, show cause within twenty (20) days of the date of this order, why a writ of mandamus should not issue from this Court ordering the said Honorable Hubert L. Will to vacate the Court order signed by him directing the Government to answer question 25 contained in defendant's motion for a bill of particulars; and

It Is Further Ordered, that pending the decision of this Court on the issues hereinbefore stated, the United States of America need not answer Question 25 contained in defendant's motion for a bill of particulars.

[fol. 67] [File endorsement omitted]

[fol. 68]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 15607

UNITED STATES OF AMERICA, Petitioner,

vs.

HONORABLE HUBERT L. WILL, Judge, United States District Court for the Northern District of Illinois, Respondent.

Petition for Writ of Mandamus

Supplemental Appendix—Filed May 3, 1966

[fol. 69]

TRANSCRIPT OF PROCEEDINGS—November 29, 1965

had in the above-entitled cause before the Honorable Hubert L. Will, one of the judges of said court, in his courtroom in the United States Court House at Chicago, Illinois, on Monday, November 29, 1965, at the hour of 10:00 o'clock a.m.

APPEARANCES:

The United States Attorney, by Mr. Richard Schultz, Asst. U. S. Attorney, on behalf of the Government;

Mr. Ira M. Burman, on behalf of the Defendant.

The Court: All right. Then I don't have any difficulty at all. I will deny the motions to dismiss the indictment

on the various grounds stated. I will write a short memorandum of opinion on it.

Now with respect to the bill of particulars, I think you ought to get most of that. The only things which it seems to me are not appropriate, you ask in specification No. 4 of the Bill, you want to know what act the defendant did on June 16, 1959.

That is a legal conclusion. I don't think the government has to, in a bill of particulars, give you a legal theory as to what act or acts the defendant did. I am not sure the defendant has to do any act, as I have just indicated. The defendant can do an act on one day and the effect of the act can be felt on a subsequent day, and that completes the crime. If I send something in the mail which explodes two days later in somebody's home, I may nevertheless be guilty [fol. 70] of homicide even though I didn't do a thing that day except stay in church all day.

I don't see that that has any relationship to this. It is a legal question solely. Now that is No. 4.

Now with respect to No. 29, they ask, if I read it correctly, the substance of statements of other persons, that is, persons other than the defendant. I think they are entitled to know if you took statements from other people, but I don't think they are entitled to have the actual statements of other people until such time as they become witnesses in the case, and then they are entitled to them under 3500. That they have taken statements of other people, I think you are entitled to know that.

COLLOQUY

Mr. Schultz: The names of the persons, your Honor?

The Court: That is right, names of the persons so that they can consult with the people if they desire to see what they have said.

Mr. Burman: That is satisfactory.

The Court: That is appropriate information, but what is contained in the statements, I think you are not entitled to that, or to the statements themselves.

Mr. Schultz: They will have a list of our witnesses that way, your Honor.

The Court: They may or may not, I don't know.

Mr. Schultz: They will.

The Court: Some of them, certainly, no question about that.

Mr. Schultz: They will have a list of all of them and perhaps some other people whose names we put on the list who we will not be calling as witnesses.

[fol. 71] The Court: They may have some people who are not going to be witnesses, and they may have some people who are witnesses who are not on the list. You may not have statements from all of them. I don't know. I have seen an awful lot of witnesses who get on the witness stand here in criminal cases, and when we ask if they have any 3500 statements, government counsel says, no, they don't have 3500 statements for this witness. So I don't conceive that the two are the same or identical or—

Mr. Schultz: When the Internal Revenue makes an investigation, your Honor, they get statements from every witness they are going to call, so we will be giving them a list of witnesses in answer to this interrogatory.

The Court: You may. You may. I don't see any harm in it unless you want to tell me that there is some reason to believe that the disclosure of these witnesses would result in some adverse consequences to the witnesses or to their testimony in this case, and you better have some showing as to why it would. If you don't have that, I don't see any reason for being secretive about who your witnesses are.

Mr. Schultz: I think, your Honor, with regard to this, we would like to have some time to consider that motion.

The Court: What do you mean? What are you going to consider? I have just ruled. Do you mean consider whether you will comply with my ruling?

Mr. Schultz: Your Honor, I didn't mean to say it that way. We would like to consider whether or not we have this problem as to whether or not by disclosing the names

of the witnesses, the persons' testimony might be altered, or what have you.

[fol. 72] The Court: If you make a showing that that is a problem, I will reconsider the ruling. But in the absence of such showing, and there is none in the memorandum you have filed so far—

Mr. Schultz: We haven't had an opportunity to make any statement on that point.

The Court: Right, but in the absence of any such statement, I don't see any reason for not disclosing the names of people from whom you have taken statements.

All right. With the exception of 4 and 29 in the specifications, I think you ought to answer, subject only to this possible motion for reconsideration in the light of a showing—I don't mean an allegation, I mean a showing—that there is reasonable ground to believe that disclosure of the names—you better specify the people.

Mr. Schultz: Yes, your Honor.

The Court: I can't conceive of any problem with the statements of revenue agents. I can't believe that their testimony is going to be adversely affected by disclosure of the fact that they have made statements, for example. On the other hand, it is conceivable that a lay witness, a citizen witness, if you have some grounds—some grounds.

Now, what about setting for trial?

Mr. Burman: Would it be possible to set it for early spring?

The Court: Early spring? It never occurred to me that this case would still be around here in early spring.

Mr. Burman: Well, Mr. Silets has a couple of matters, one pending in the Supreme Court, and it would be difficult to prepare for it prior to spring.

The Court: How soon will the government be ready?

Mr. Schultz: Your Honor, first I would like to state that [fol. 73] we understand there will be a motion to suppress in this case. I know you generally hear that just before the trial.

The Court: Yes, at the time of trial.

Mr. Schultz: In this case probably there will be six or seven witnesses altogether. It will take some time.

The Court: Fine. We will hear them at the time of trial.

Mr. Schultz: It will take the government perhaps a week to prepare the case. So any time with a week's notice we can be ready.

The Court: It will take you a week to get them the answers to the bill of particulars, and they are entitled to a little time thereafter to look at it.

Mr. Schultz: Yes, your Honor.

The Court: I will set this then to set for trial on Monday, January 3rd, at two o'clock, and I will expect to try it reasonably shortly thereafter.

Mr. Schultz: How much time, your Honor, will the government have to answer the bill of particulars?

The Court: I think the rules give you fifteen days, don't they?

Mr. Schultz: Thank you, your Honor.

The Court: I am not sure of that. If they give you twenty days, you have twenty. If they give you ten days, you have ten.

Mr. Schultz: We will check the rules.

Mr. Burman: When will we know about this one objection?

The Court: I take it you will know within the period of time in which the government is required to answer.

Mr. Schultz: Yes, sir.

[fol. 74] Reporter's Certificate to foregoing transcript (omitted in printing).

TRANSCRIPT OF PROCEEDINGS—December 3, 1965

had in the above-entitled cause before the Honorable Hubert L. Will, one of the judges of said court, in his courtroom in the United States Court House at Chicago, Illinois, on Friday, December 3, 1965, at the hour of 10:00 o'clock a.m.

APPEARANCES:

The United States Attorney, by Mr. Richard Schultz, Asst. U.S. Attorney, on behalf of the Government;

Mr. Harvey Silets, on behalf of the Defendant.

The Clerk: 65 CR 432 and 65 CR 464, United States of America versus Simmie S. Horwitz, motion to vacate court order of November 29, 1965 and grant leave to the government to file a memorandum in support of its motion.

COLLOQUY

Mr. Schultz: This is a motion by the government asking that the Court reconsider its order that the government [fol. 75] answer questions 14, 25, 28 and 29(a) of the defendant's bill of particulars in this case. You might recall, your Honor, we were ordered to answer all of the questions except 29(b) and question 4. The grounds for our motion, your Honor—

The Court: Where does question 25 say you are to give them the names of the witnesses? It says names of people who engaged in conversations, whether or not they are witnesses. You have inserted that they are witnesses.

Mr. Schultz: "Upon which we rely."

The Court: You have inserted that they are witnesses.

Mr. Schultz: Upon which we rely. If we rely on them to support our charge, they are going to testify. If we don't rely on them, they won't.

The Court: They may or may not. I assume that some will and I suspect that some won't.

Mr. Schultz: Your Honor, in any event we will be giving the names of all of the people who will testify because we are relying on them, and consequently we are giving a list of witnesses.

The Court: I don't know whether you are. I take it there can be people who can testify who never had conversations with the defendant. Every time you put an agent on who makes computations, he never talked to the defendant. He is just a witness called by the government to prove part of the government's case to the extent that he is responsible for it.

Mr. Schultz: No, your Honor, we have that question, too. It is not only those conversations on which we rely, but all witnesses on which we rely. There are different questions. We are asking that both of them not be answered. [fol. 76] In either event we are going to be giving all of our witnesses.

In answer to one question, it is those witnesses who testify as to the conversations of the defendant, and in answer to another question it is those witnesses upon which the government relies in supporting its case. The second question encompasses the first, and there are additional witnesses that we will have to set forth in the second question.

It is our position, your Honor, that the law does not require us to give a list of witnesses except in a capital case or treason case.

The Court: I don't follow you. You know, you cited me Judge Learned Hand who talks about giving evidence. Nobody is proposing that you give the evidence. It is proposed that you give them the names of the people and they can go out and interview them and determine what, if anything, these individuals are going to say. They are not asking you to give the evidence.

Well, I will take a look at it. I am not going to grant the motion. Do you want to file a memorandum in response, Mr. Silets?

Mr. Silets: I received the motion and memorandum this morning, your Honor, but I prefer to rely on our prior briefs and the Court's prior ruling.

I am just somewhat upset about this proliferation of the briefs and motions and so on. Once the Court rules contrary to the government, the government feels obliged to file additional briefs and motions.

The Court: Well, Mr. Silets, it is no secret that the government is disturbed that I am making available to defendants the identity of people who are alleged to have been [fol. 77] present when transactions took place, which the government contends are illegal. I must confess I have difficulty understanding why that is something the government should keep hidden from defendants who are supposed to defend against their guilt in connection with the transactions in question.

But the government has been disturbed ever since I came over here that I was being unduly helpful to defendants by having the government identify people who were supposed to have been there when the crime took place. I can't quite understand why that is unwarranted disclosure on the part of the government, but I recognize that the prosecution feels that it is helpful to them to the extent that they can keep their case secret, and that the law does not require that they disclose their evidence. I have never required them to disclose their evidence, but I have required them to identify the people with whom the defendant is supposed to have participated in an illegal act but who were present.

I get the same motion in opposition, I get the same brief in opposition to a bill of particulars every time. I must have examined fifty of them by now. They never tell me anything more than the last one told me; that is, the government doesn't want to give this information because it will disclose its witnesses.

I say maybe they will be witnesses and maybe they won't, and I see time and time again, an informer doesn't show

up as a witness in a narcotics case or another kind of a case, a tax case, and I am told if we give them his name, we will be giving the name of a witness.

There is not much I can do about it except to continue to apply what I conceive to be the minimum concepts of [fol. 78] necessary disclosure in a motion for a bill of particulars to enable a defendant to defend against—not to make the government disclose its case, but give the defendant a reasonable opportunity to know what he is charged with, who was present, where it took place, what time of the day or night it took place, and then let the defendant go out and interview the people if he so desires and see what they are going to say.

Mr. Schultz: Your Honor, may I state there are thirty questions in the bill of particulars. We have drafted an answer of about twelve pages. We are going to redraft it. Among these questions which we have already answered and which we will ultimately answer, we are to list the bank accounts upon which we are relying and give our analysis of the bank accounts, that is, which is a transfer of funds, which entry is a deposit of unreported gross receipts and what isn't.

This certainly is the work product of the government. We have been ordered to answer that and we are not complaining at this time—we are not complaining at all, but certainly this is advising the defendant of his rights.

We are asked to answer among these questions, what money the defendant personally got. The charge here is false subscription of a corporation tax return. What money the defendant got is totally immaterial, totally irrelevant. What acts the defendant did upon which we are relying, time of the act, place of the act, nature of the act—this is the general gist of all the questions.

The Court: That is not irrelevant, the time and the place of the act.

Mr. Schultz: I am not saying that is irrelevant, your Honor.

[fol. 79] The Court: If that isn't relevant, nothing is relevant. There is no crime if that isn't relevant.

Mr. Schultz: We are certainly advising him of what the charge is and what the case is going to be, what our presentation of the case is going to be. He is getting more than enough information. He has thirty questions like this, your Honor.

The Court: I will take a look at your motion and your brief. If I conclude that there is anything in my order which is inherently prejudicial to the government or unfair, I will revise it, but my initial reaction is that telling a defendant who it was you saw him do or heard him do or participated with him in an act which is charged as a violation of the law is not unfair disclosure of the government's position or of the acts which the defendant is being required to answer for. Well, I will take a look at it.

Mr. Schultz: Would your Honor set it for another date?

The Court: No, I will just rule. I will take a look at it. Mr. Schultz, you are going to file an answer to some of the questions. You are simply asking that 14, 25, 28 and 29(a) not be answered at this time, and that I amend my order with respect to those.

Mr. Schultz: There is one additional question, which I don't know the number right at the moment, which is similar to question 14, which we are also objecting to, which we made reference to in our proposed answer of the bill.

The Court: You haven't listed it in the motion?

Mr. Schultz: No, your Honor. We found later it was almost an identical question to 14, and in our proposed answer we say refer to our motion.

The Court: What am I supposed to rule on?

[fol. 80] Mr. Schultz: We will file this probably Monday. You will have a copy of this by Monday.

The Court: I am not going to rule on that. I am going to rule on a motion which you filed with respect to questions 14, 25, 28 and 29(a), and that is all. If you want me to rule on some other question, you better include it in the motion. Mind reading I don't do.

Mr. Schultz: May I give you the number, then, your Honor, or should I file it?

The Court: You better give me the number.

Mr. Schultz: It is question No. 7.

The Court: You want me to add 7 to this?

Mr. Schultz: Not the whole question, your Honor, just the part which requires us to give the names, addresses, and so on.

The question is: "In describing the items requested in Request No. 6, state the date received, the gross amount, the name and address of from whom received, and the nature, amount and date paid."

We say that again—

The Court: The name of from whom received should not be disclosed? Doesn't it follow automatically if you tell them the date of the payment and so forth? What is the difference? You know it just saves him going back and correlating all of these things with the identity of the payor, doesn't it?

Mr. Schultz: Yes. If we give him the date, he can correlate it to the name.

The Court: You have it. It is easier to put it down than have him going through documents to track down to see the name of the payor.

[fol. 81] Mr. Silets: It may not even be possible for us to track it down.

The Court: It is conceivable that you couldn't tell from whom it came.

Mr. Silets: That is right.

Mr. Schultz: Certainly if a witness testifies, your Honor, that they paid X number of dollars, and we can show that that money was not reported—

The Court: Why is this such a great secret?

Mr. Schultz: Your Honor, the law does not require us to make this disclosure.

The Court: I don't know whether the law requires it or not. The law says you are to disclose such information as

is necessary to enable the defendant adequately to prepare his defense.

I would think that the identity of a person alleged to have made payments to the defendant which were not reported in the income tax return, the identity of such a person is part of the information which the defendant will need in order to be able to adequately prepare his defense. You may have some judges who disagree with me, but this is certainly within the area of judicial discretion. But if I were defending this case, I would think it was necessary to know who it was who allegedly paid.

You know, I have tried a number of income tax cases here. You bring in Mr. so and so who says I gave Mr. X $6,000 in 1960 for legal services, and then he is asked on cross examination, "Wasn't it a loan?" and so forth.

In order to defend the case you have to find out who the people are so you can prepare whatever the defense may be. But I must confess to you I don't see where the government can be prejudiced, except as it hopes by last-minute [fol. 82] disclosure to preclude the defendant from preparing an adequate defense. I don't see how the government can be prejudiced by disclosing the identity of a person who made payments to the defendant which allegedly the defendant did not include in his income tax as reported to the government. What is the defendant going to do? Go around and get the fellow to say he didn't make the payments? You have evidence of the payments. What is he going to do, hand him a post-dated note in which he says he is going to pay it back?

Mr. Schultz: Even in treason cases where the government has to give a list of witnesses, you don't have to give it until three days before the trial.

The Court: I am not talking about giving a list of witnesses.

Mr. Schultz: That is exactly what we would be giving, your Honor.

The Court: Mr. Schultz, you are not going to persuade me that you could make somebody who is a participant in

an act which is alleged to be the crime, a hidden character, a Mr. X, just by saying we are going to call him. I don't understand where the government gets the right to hide its witnesses or, the other way around, to say that they will not disclose the identity of a person who participated in an act which the defendant is charged with having done illegally by saying we are going to make him a witness. I don't follow that.

I have said in cases where there was any suggestion that the disclosure of the identity of the witness would prejudice the witness physically or otherwise or prejudice the presentation of the government's proof, that is another matter. [fol. 83] That is another matter. I told you that the other day.

Mr. Schultz: Yes, you did, your Honor.

The Court: If you have any witnesses here whom you are prepared to say have a legitimate basis for concern with respect to their physical safety or with respect to the testimony they will ultimately give, I will hear that in a minute. I will hear that in a minute, but other than that, simply to say we don't want to disclose these names because we think this will enable the defendant to interview these people and find out what they are going to testify and thereby attempt to make a reasonable defense to it—that is what you're supposed to be able to do. He is entitled to make a reasonable defense to testimony of witnesses who are going to testify against him.

You know, I have great concern that in a civil case we require both sides to submit their witnesses to maximum deposition when all that is involved is money. In a criminal case, the government doesn't even want to disclose the name of a person so the other side can go out and interview him when what is concerned is life or liberty. To me this is a very strange aberration of the processes of justice as between civil and criminal cases. When all that is involved is money, we say put your cards on the table. Where life and liberty are involved, we say to the prosecution you don't have to tell him a thing.

Mr. Schultz: Your Honor, I submit the reason for the distinction is because in criminal cases, since there is much more at stake, as you point out, life and liberty, there is more chance, more reason to construct a fabrication once you know what the other's case is than in a civil case.

[fol. 84] The Court: Mr. Schultz, if the government doesn't have a sufficient case so that it will stand the light of day before trial, it ought not bring the case. It ought not bring the case. If it has to get one by because if it were examined carefully and thoroughly it would be disclosed not to have substance, then the case should not be brought.

Now any evidence of a fabrication, believe me, we will deal with it. The laws of perjury—we have had convictions for perjury here, and we will have them again, I have no doubt, arising out of criminal cases, but I am not prepared to say to a defendant that you may not have the information which it seems to me you reasonably require to prepare your defense because I am afraid you or somebody helping you will lie and we won't be able to do anything about it.

Mr. Silets: I am not even sure that Mr. Schultz is going that far to suggest that the defendant in this case or his attorneys would fabricate a defense.

Mr. Schultz: Certainly I am not suggesting the attorneys would fabricate a defense.

Mr. Silets: Is he suggesting the defendant would?

Mr. Schultz: We are not only talking about this very case, your Honor.

The Court: Well, I am talking about this case. That is what I am ruling on. That is what I ruled on last week or earlier this week. That is what you are asking me to reconsider, to vacate.

Mr. Schultz: My statement of a moment ago was not—

The Court: I told you that any time you made a representation with any foundation in support of it that the disclosure of the name of an individual would either jeopardize him physically or jeopardize the government's proof [fol. 85] in the case and that his testimony might be altered

or effort might be made to persuade him not to testify, or something else, I am prepared to say under those circumstances of that showing we don't risk people's lives or their security, their physical well-being, and we don't encourage any possible circumstances in which testimony can be suppressed. That is consistent, it seems to me, with my general philosophy that you shouldn't be suppressing things; and if there is a threat of suppression then I will take the lesser suppression to prevent the greater.

Mr. Silets: I can assure your Honor in this case Simmie Horwitz, the corner druggist, is not going to attempt the lives of the witnesses here.

Mr. Schultz: Your Honor, just one last statement, and that is in your view, which is a rather liberal, enlightened view, perhaps, wasn't even adopted in the proposed new rules of discovery under the criminal rules by the American Bar Association.

The Court: Well, it was and it wasn't. If you want to get into that discussion it will take a long time because I have read them. I would go further than they go, but they certainly go a lot further than you—a lot further.

Mr. Schultz: They would not require the answers to these questions.

The Court: I don't agree with that. They would not require the giving of a list of witnesses, and I don't conceive that I am, though I recognize some of these may be witnesses. I don't conceive this to be a list of witnesses. [fol. 86] The government is not bound by this list. They can put people in who are not on the list.

In a civil case you give a list of witnesses and you can't call a man to the stand unless he is on the list of witnesses. I have never proposed that in a criminal case, though logically it seems to me there is a reason to say if this is legitimate in a civil case where nothing but money is at stake, why not require the government to put the witnesses on in a criminal case where liberty and life may be at stake.

I have never proposed that. I say you should disclose people who were present, whom you say were present when the illegal act was committed, and that is all.

Well, I will look at your motion.

Mr. Schultz: Thank you, your Honor.

Reporter's Certificate to foregoing transcript (omitted in printing).

[fol. 87]

TRANSCRIPT OF PROCEEDINGS—January 4, 1966

had in the above-entitled cause before the Honorable Hubert L. Will, one of the judges of said court, in his courtroom in the United States Court House at Chicago, Illinois, on Tuesday, January 4, 1966, at the hour of 10:00 o'clock a.m.

APPEARANCES:

The United States Attorney, by Messrs. Richard Schultz and Robert A. Galbraith, Asst. U. S. Attorneys, on behalf of the Government.

Mr. Harvey M. Silets, on behalf of the Defendant.

The Clerk: 65 CR 432 and 65 CR 464, United States of America versus Simmie S. Horwitz, to set trial, and motion for entry of order directing the Government to furnish particulars, or, in the alternative, to dismiss indictments.

COLLOQUY

Mr. Schultz: Your Honor, the government has just tendered to opposing counsel and filed with the Court our amended answer to the bill of particulars.

Our office and the Department of Justice have been consulting with regard to the Court's order requiring us to answer questions on the bill, and at this time I want to state to the Court that the government respectfully refuses to answer questions 14, 25 and 29(a).

The Court: What are 14, 25 and 29(a)? I don't even remember at this stage of the game.

Mr. Silets: Your Honor, perhaps it would ease the Court's review of this if I hand you a copy of the motion for bill of particulars.

[fol. 88] The Court: Yes. Now, what is the objection to 14?

Mr. Schultz: Your Honor, in answer to question 14 we would be giving a list of a substantial number of the government witnesses. Also in answer to 25 and 29, we would be giving also lists of our witnesses. In fact, we would be giving all of our witnesses, and that is our objection, your Honor.

Mr. Silets: Your Honor, I might say that the Court has thoroughly reviewed this, both in the opening phase in support of the original bill and upon the government's motion to vacate the order of November 29th. Your Honor has filed a comprehensive opinion wherein the same objections were reviewed by the Court and denied.

The Court: I refused 29(b), didn't I?

Mr. Schultz: Yes, sir.

The Court: Which was the substance of the statements?

Mr. Galbraith: That is right. This is directed only to 29(a), your Honor.

The Court: Right.

Mr. Galbraith: The same with 25(d). You did not require us to answer that.

Mr. Schultz: Which was the substance of the statements.

The Court: 25(d) the substance of the statement.

Mr. Schultz: Yes, sir.

The Court: Now what do you want, Mr. Silets?

Mr. Silets: Well, if they are going to refuse, your Honor, I might make one of two suggestions to the Court:

First, as far as the defendant, Simmie S. Horwitz, is concerned, we would prefer to see the indictments dismissed. In the alternative, I suppose the United States Attorney has failed to comply with the order of this Court, [fol. 89] and that a rule to show cause be issued as to why they should not be held in contempt.

As far as we are concerned, I prefer to see the indictments dismissed. The Court has reviewed this thoroughly, the Court has handed down its memorandum opinion reviewing the specific issues and has denied the government's contentions.

I might say that if a defendant were to take this arbitrary position in light of the Court's order, severe punishment might prevail upon him. I don't ask that the United States Attorney be sent to jail. I suggest only at this moment that the indictments be dismissed, but if the Court does not see fit to do that, that perhaps a rule to show cause be issued.

The Court: Well, I don't conceive that this is a basis for dismissing the indictments as such.

Mr. Silets: Your Honor, I tried to conclude as to what alternatives the Court has—

The Court: I think I will just postpone trial of this case indefinitely.

Mr. Silets: That is all right with us, your Honor.

The Court: Next case.

Mr. Schultz: Thank you, your Honor.

Mr. Silets: Thank you, your Honor.

Before Judge Will, Tuesday, January 4, 1966, 2:00 o'clock P.M.

PRESENT:

Mr. Schultz, Mr. Galbraith.
Mr. Silets.

[fol. 90] The Clerk: 65 CR 432 and 65 CR 464, United States of America versus Simmie S. Horwitz, defendant's motion to dismiss indictments.

The Court: I thought I ruled on this this morning.

Mr. Silets: Your Honor, when this motion was made this morning, your Honor indicated you thought you had no authority to dismiss the indictment.

The Court: No. No, I didn't say that. I said I was not prepared to dismiss the indictments for failure to comply with the motion for bill of particulars or an order for bill of particulars in this respect, in this area. I think I could dismiss it.

Mr. Silets: Yes, sir. As I pointed out in this motion, there are two Supreme Court decisions, one coming out of this district, right in point, which says that the court has the authority and should dismiss the indictment if the government refuses to comply with the direction in the bill of particulars.

The other aspect of my motion, your Honor, is this: that the net effect of the court putting this matter on an indefinite status is that the defendant is going to be subjected really to an indefinite term in the sense of not knowing when his cases, if ever, will go to trial, and that rests, as I understand it, on the discretion of the United States Attorney.

We have indicated as an alternative basis of the motion that the indictments be dismissed for want of prosecution as a violation under the Sixth Amendment of the Constitution, depriving the defendant to a speedy trial. We feel that once we get these particulars, within a reasonable length of time we will be prepared to go to trial, after having interviewed these people and prepared our defense. [fol. 91] But the net effect of the government's persistence in refusing to comply with the Court's order is that we will never know when, if ever, we are going to go on trial, and certainly we can't be said to have a speedy trial.

The Court: Well, Mr. Silets, I guess you are going to have to mandamus me because I am not going to dismiss the indictments, even though I think the government should answer those particular inquiries, and I am not going to proceed to try the case until the information is forthcoming.

I will take another look at it in sixty days, something of that sort, but unless the information is produced, I am not going to proceed to trial on the cases and I am not disposed to dismiss the indictments at this point. I may later.

I may later, if the government persists in its refusal to answer the bill of particulars, I may then dismiss the indictments.

Instead of continuing it indefinitely, let's continue it for sixty days and we will see where the government stands at that point.

Mr. Schultz: Thank you, your Honor.

The Court: If they stand where they are now, I may dismiss the indictments at that point.

Mr. Silets: Would that be a specific date?

The Court: Yes, sixty days from today, which will be—we will make it Monday, March 7th.

Mr. Silets: Thank you, your Honor.

Reporter's Certificate to foregoing transcript (omitted in printing).

[fol. 92]

TRANSCRIPT OF PROCEEDINGS—March 7, 1966

had in the above-entitled cause before the Honorable Hubert L. Will, one of the judges of said court, in his courtroom in the United States Court House at Chicago, Illinois, on Monday, March 7, 1966, at the hour of 10:00 o'clock a.m.

PRESENT:

Hon. Edward V. Hanrahan, United States Attorney, by Mr. R. G. Schultz, Asst. U.S. Attorney, on behalf of the Government.

Mr. Harvey M. Silets, on behalf of the Defendant.

The Clerk: 65 CR 432, United States of America versus Simmie S. Horwitz, and 65 CR 464, United States of America versus Simmie S. Horwitz, motion for entry of an order directing the government to furnish particulars, or, in the alternative, to dismiss indictments, and to set for trial.

The Court: What is the problem?

Mr. Silets: Well, your Honor, I think we are in the precise position that we were sixty days ago. On several occasions I have asked the government to furnish the par-
[fol. 93] ticulars, and they have indicated to me their position will be the same, that they will not furnish them. So I have renewed the motion that I made sixty days ago, that that the government either furnish them or that the Court dismiss the indictments.

The Court: Let's find out. Mr. Schultz, is it the government's continued position that this information they are not going to produce?

Mr. Schultz: Yes, your Honor.

The Court: This is information which, as I understand it, relates to the basis on which the government charges that there was unreported income. That is the issue, isn't it?

Mr. Silets: Yes, it is.

The Court: And you are not going to tell the defendant what it is that you base your claim of unreported income on, is that right?

Mr. Schultz: No, your Honor. The questions that we have refused to answer ask for the names and addresses of witnesses who will testify—

The Court: No. It asks for the names and addresses of people who paid the defendant something upon which you base the charge of unreported income, isn't that right?

Mr. Schultz: There are three questions. That is the first question.

The Court: Right, and that you refuse to answer?

Mr. Schultz: Yes, your Honor.

The Court: You are not going to tell them who the people are who were the source of unreported income which you charge him with criminally having failed to report, right?

Mr. Schultz: Yes, sir.

[fol. 94] The Court: Okay. Now what is the second one?

Mr. Schultz: That is Question 14, your Honor. The next question, Question 25, refers to 24, and 24 says: "Does the government rely upon any oral statements of the defendant to support the charge in the several counts of the indictments?"

The Court: What was your answer to that?

Mr. Schultz: Yes. I believe the answer was yes, your Honor.

The Court: You rely on some sort of oral admissions of the defendant?

Mr. Schultz: Yes, your Honor. I believe we answered yes.

Question 25 is: "If the answer to Question 24 is in the affirmative, state with respect to each statement if there was more than one (a) the name and address of the person to whom the statement was made, the date upon which the statement was made, the place where it was made."

Your Honor ruled that we do not have to answer the next question which is the substance of the statement.

The next question is—

The Court: But you do have to identify the circumstances under which it was allegedly made. As a matter of fact, the more I think about it I don't know why I didn't have you answer what the substance of it was, too.

Mr. Schultz: I believe you did order us to answer that and then you amended that, vacated that order later, your Honor.

The Court: I was very generous. It seems to me if you have a confession or admission, you ought to tell them what the substance of it is as well as tell them the time, place and person to whom it was made.

[fol. 95] You are now not going to do that either, as I understand it, right?

Mr. Schultz: Your Honor ruled that we didn't have to do it.

The Court: No. No, I am talking about the time, place and persons to whom it was made.

Mr. Schultz: No, we have not done that, your Honor.

The Court: Right. I didn't rule you didn't have to do that. I ruled you did have to do that.

Mr. Schultz: Yes, your Honor, you did.

The Court: Right. All I did was make the mistake of telling you that you didn't have to tell them what the substance of the alleged confession or admission was.

Mr. Schultz: Yes, your Honor.

The Court: So far I have made one error on the side of the government. Now what is the third category?

Mr. Schultz: There are some more questions under that one. Briefly they are whether the person to whom the statement was made was a government agent at the time of the statement; the names and addresses of any other persons present at the time the statement was made; and the last part of the question is whether any written memorandum or verbatim transcript was prepared and where it is.

The Court: These are admissions which you intend to use at the trial?

Mr. Schultz: Yes, your Honor.

The Court: You are not going to tell him what they were, to whom they were made, the circumstances under which they were made, the time, place, anything else, right? You are going to let him guess about what these confessions are that you are going to use at the trial, right?

[fol. 96] Mr. Schultz: They are not confessions.

The Court: What is an admission but a confession?

Mr. Schultz: Yes, sir.

The Court: So at this point you are not going to tell him who the persons were who were the sources of the alleged unreported income; two, you are not going to tell him what confessions were made and under what circumstances they were made.

What is the third category?

Mr. Schultz: The third question is Question 29, which relates to Question 28. Question 28 is: "Does the government rely upon the statement of any person other than the defendant to support the charge in the several counts of the indictments?"

The answer to that, your Honor, was yes.

Question 29 is: "If the answer to Request No. 28 is in the affirmative, state with respect to each such person if there was more than one, (a), the name and address of each such person or persons—"

The Court: These are people from whom written statements were taken?

Mr. Schultz: Statements, your Honor.

The Court: I take it that means written statements.

Mr. Schultz: Well, it doesn't say, your Honor. It doesn't say at all.

The Court: Let's assume it says written statements for the purposes of discussion. I take it, Mr. Silets, you are prepared to deal with written statements.

Mr. Silets: Yes, I am, your Honor.

The Court: Right.

Mr. Schultz: First of all, there is no indication—

[fol. 97] The Court: I am telling you now that I will order you to produce only written statements.

Mr. Schultz: A statement written by the prospective witness—

The Court: Or signed by him. I don't care who writes it. The mechanics don't interest me. The question is whether he signed it or not. These are statements now of people who have, I take it, made incriminating statements with respect to the defendant, right?

Mr. Schultz: Statements upon which the government relies to support the charge in the indictment.

The Court: Which are going to be introduced at the trial. We are talking about statements to be introduced at the trial.

Mr. Schultz: Your Honor, as I stated before—

The Court: I take it these are 3500 statements which will have to be produced at the trial in any event, won't they?

Mr. Schultz: Yes, your Honor.

The Court: Fine.

Mr. Schultz: Let me say that we have previously discussed this, and I explained to your Honor this being an Internal Revenue case, the investigation conducted by special agents, I represented to the Court that except possibly in the case of an accountant, we have statements signed by every witness who will testify for the government.

The Court: These you will have to produce at the trial under Rule 3500?

Mr. Schultz: Yes, your Honor. I imagine so. I can't think of any right now that would not be produced. All statements, all memoranda that we have, will be produced as each witness testifies, but this would include, your Honor, [fol. 98] the list of every witness who is going to testify.

The Court: I don't know whether it would or not.

Mr. Schultz: Except for an accounting expert.

The Court: You tell me that it would, but certainly I know—you say the expert is going to give the summarization, tabulation, computation, and so forth, and isn't going to give you a statement, and you are not going to identify him. But you say there is nobody else who will not be identified as a result of this because you have statements from everybody?

Mr. Schultz: Yes, your Honor.

The Court: That is the coincidence of this kind of a case, I take it. Well, I think, Mr. Silets, I am going to give the government one final chance. With respect to the statements which are in the nature of 3500 statements, I am not going to order them produced at this time.

Mr. Silets: Your Honor, I think the Court has already ruled that one of the requests was for the substance of the statements—

The Court: And I have said that that wasn't—

Mr. Silets: Right, and all your Honor directed was to give the names and addresses of the persons.

The Court: Right. I am going to back off of that just to keep the record clear because if they don't give the information that I think you are entitled to, I am going to dismiss the indictments, and I want to have no question about the propriety of the dismissal.

Mr. Silets: Yes, your Honor.

The Court: So I am going to order them to produce all admissions or confessions of the defendant orally or in writing that they are going to rely upon, give the infor-
[fol. 99] mation that is involved there. Whether it is an oral admission or confession or written admission or confession, you are going to produce them or give the information which is requested with respect to them, and you are going to identify the names of the individuals whose payments to the defendant you contend is unreported income upon which the criminal prosecution is based. You are not required to give what are in the nature of 3500 statements which would be produced at the trial.

Now, is the government's position that you will not give any of that information?

Mr. Schultz: No, I am not sure of that, your Honor. May I—

The Court: It has been your position so far, and I want to find out.

Mr. Schultz: No, your Honor. As I understand it, your Honor—

The Court: I have now told you to answer 14.

Mr. Silets: And 25.

The Court: 14 and 25.

Mr. Schultz: As I understand the answer to 25, the government is to give the names and addresses of the persons to whom the statements were made.

The Court: And the substance of the admission.

Mr. Schultz: And the substance of the admission?

The Court: Right. If this is a confession which you say was an incriminating confession, he is entitled to know what the substance of his confession or admission is.

Mr. Schultz: Your Honor, if they were not made to a government employee, would you consider them to be an admission?

[fol. 100] The Court: I take it that they are an admission without regard to whom they are made. An admission is an admission. Some of them are privileged and some aren't.

If I tell my lawyer I did something, that is privileged. If I tell my business partner, that may or may not be. If I tell my cousin, it pretty clearly isn't.

Mr. Schultz: Are you ordering us now to give the substance also? We weren't ordered to do that before.

The Court: Yes. I have just revised it because I think it is correct. I think you should tell them who and what, and where and when.

Now what is the government's position?

Mr. Schultz: May we have a week, your Honor?

The Court: A week?

Mr. Schultz: Yes, sir.

The Court: All right. I don't want to hurry you while you make up your mind on this matter, but I will tell you right now that if the government is unwilling to give that information, that is, the names of the persons and the amounts from whom the unreported income was allegedly received on which the criminal prosecution is based; and, second, the names, time, place and substance of any alleged admissions or confessions which will be used at the trial, I will dismiss the indictments.

A week from today.

Mr. Schultz: Thank you, your Honor.

Mr. Silets: Thank you.

Reporter's Certificate to foregoing transcript (omitted in printing).

[fol. 101]

TRANSCRIPT OF PROCEEDINGS—March 14, 1966

had in the above-entitled cause before the Honorable Hubert L. Will, one of the judges of said court, in his courtroom in the United States Court House at Chicago, Illinois, on Monday, March 14, 1966, at the hour of 10:00 o'clock a.m.

PRESENT:

Hon. Edward V. Hanrahan, United States Attorney, by Mr. R. G. Schultz and Mr. R. A. Galbraith, Asst. U.S. Attorneys, on behalf of the Government.

Mr. Harvey M. Silets, on behalf of the Defendant.

The Clerk: 65 CR 432, United States of America versus Simmie S. Horwitz, and 65 CR 464, United States of America vs. Simmis S. Horwitz, to set trial.

COLLOQUY

Mr. Schultz: Your Honor, the government has been ordered to answer questions 14 and 25 of the defendant's motion for bill of particulars.

We have, and we would like to file with the Court now, the answer to question 14, which is to give the names and addresses and amounts that each person will testify to if we use a specific item method, and we have set forth that information.

[fol. 102] With regard to Question 25, your Honor, I would like to state that so far the government has produced by motions, through bill of particulars, the government's theory of the case, the government's method of proving the case, the names as we have tendered now of each witness who will testify as to specific items. We also have the amounts and dates paid by each witness. We have told the defendant the records which the government will rely on in presenting its case.

In addition to this, your Honor, we have given the defendant about five pages setting forth each exact understatement of gross income, the amount and the date. We have set forth each one of these. We further told the defendant the acts of his that we are generally relying on in presenting our case.

Your Honor, except for the statements by the defendant, the government has given the defendant its entire case, and he knows each and every thing the government will prove. There will be nothing at trial except for that one exception which we have not already given by way of bill of particulars, and we think the defendant is well informed of the government's case. There will be no surprise at all, and we request the Court to reconsider its ruling on Question 25.

Mr. Silets: Your Honor, I gather from the government's comments that they persist in their refusal to comply with this Court's direct and specific order on several occasions to furnish the particulars with respect to request No. 25, and therefore I renew my motion. I have submitted to this Court a draft order which incorporates the act of the government furnishing in open court their answers to re-
[fol. 103] quest No. 14, and I ask the Court to dismiss the indictments.

Might I say this, your Honor, that if it were anybody but the United States who would stand before this Court and say I will not comply with your order that more drastic action might be taken with respect to such indifference than what the defendant here seeks.

I suggest, your Honor, that the appropriate action by this Court in response to the government's persistent and flagrant refusal, I might add, is to dismiss the indictments.

The Court: Let me understand you, Mr. Schultz. You say that you are not prepared to tell the defendants on what occasions, that is, time and place and person present, they are alleged to have made incriminating admissions which will be the subject of testimony at the trial. Is that correct?

Mr. Schultz: Your Honor, that is only part of the question. The question asks for more than incriminating admissions. It says "all oral statements" of the defendant which would include incriminating admissions or confessions, whatever it might be.

The Court: I take it that oral statements about the weather are of no interest to you. It is only oral statements which are incriminating that you are interested in. That is what we are talking about.

Mr. Schultz: Your Honor, material—

The Court: I take it the defendant is not interested in being told when he had social chit-chats with people. They are interested in conversations which will be the subject of testimony which will presumably be adverse testimony from the defendant's point of view. Right?

Mr. Schultz: Yes, your Honor.

[fol. 104] The Court: It is limited to that, I take it.

Mr. Silets: Material to the proceedings.

The Court: You are talking about oral statements which are material to the proceedings.

Mr. Silets: Yes.

Mr. Schultz: I am merely suggesting, your Honor, there might be an oral statement which is material but not necessarily an admission.

The Court: We broadened that, I agree, though I think that those are the unlikely rather than the likely statements.

Mr. Schultz: Yes, your Honor.

The Court: If I understand you correctly, you are unwilling to advise the defendant—and I have not ordered you to tell them the substance of the statements. I have simply ordered you to tell who was present, what time the statements were made and where they were made.

Mr. Schultz: The order, your Honor, is to give the substance as well.

The Court: I have said I would not require that.

Mr. Silets: No, sir. You amended that order last week in an exchange of the same sort.

The Court: And excluded these.

Mr. Silets: No, you included these last week. This was the same kind of exchange, and your Honor said we were entitled to that sort of material.

The Court: I don't think there is any question that you are entitled to statements made to government agents. There is no question about that at all. Statements made to third parties, I don't think you are entitled to those. This is the difference between them, as I see it.

Mr. Schultz: Your Honor, we will be prepared to give them statements made to government agents.

[fol. 105] The Court: You have already given them statements made to government agents?

Mr. Schultz: No, your Honor. That is included in Question 25, all statements, the question requests, and we have given no answer at all to that question.

The Court: You are not going to give the statements made to government agents either?

Mr. Schultz: No, your Honor, I think we will give the statements to the government agents.

The Court: It would be a new rule if you could keep confessions to yourself until the trial.

Mr. Schultz: No. We will give all statements, if I understand it, your Honor, in the form of admissions made to government agents.

The Court: All right. So now we are down to the question of statements made to nongovernment agents which the government intends to use at the trial.

Right?

Mr. Schultz: Yes, sir.

The Court: Suppose I am the defendant and I have to defend against this testimony. I don't know until the trial where the statements allegedly were made, by whom they were made, what time of day or night they were made.

If I want to get somebody else in who was present at that conversation, I have to do so at the last minute, after I have heard the testimony, and try to run around and find out where any other persons who were present might be at that time. Or, let's suppose that I want to establish that I wasn't there, that the conversation never took place, that I was in Florida or Puerto Rico, Wisconsin, California, [fol. 106] Texas, wherever you like. I have to go and get hotel records and other substantiating data.

What am I supposed to do at this stage of the game when the defense asks me, your Honor, would you postpone the trial, please, while we now start to run around because this is the first time the identity of the person to whom the statement was made, the time at which the statement was made, the place at which the statement was made has been brought to our attention. The government has clutched this to its bosom until this moment. Now we know for the first time. We require some time to defend against this.

What do I do then? Recess the trial while they go chasing telephone or hotel records, or persons who were also

present at the conversation who can testify whether or not the government witness has stated accurately the subject of discussion?

Otherwise we end up with the defendant saying no, I didn't say that, and the government witness saying, yes, and there being a third witness, fourth witness or fifth witness who can say that isn't what was said; or the defendant says I wasn't in Chicago that day, and the government witness says this is what happened, you were here, this is what was said. Now we have to wait to see if they can secure any evidence indicating that they weren't in fact in Chicago on that day.

I don't quite understand. What benefit is the government going to get out of refusing to disclose the identity of a person, other than a government agent because you are going to give them those statements. We are talking about a nongovernment agent.

Mr. Schultz: Yes, your Honor.

[fol. 107] The Court: Is there any suggestion that Mr. Silets or his client are going to effect a change in the nongovernment agent's testimony about these conversations because they know who he was and where the conversation took place and when it took place or what time of day or night?

Mr. Schultz: Yes, your Honor. I would think that in all criminal proceedings where the defendant's life and liberty are in jeopardy, there would be the propensity to attempt—

The Court: Mr. Schultz, this is not a capital case. The defendant's life is in no sense in jeopardy.

Mr. Schultz: Precisely. That is why in capital cases this information is given, and it is not given in other cases.

The Court: Mr. Schultz, there is nothing in the books which says that you don't have to give it in this case. It simply says you do have to give it clearly in a capital case, and as a matter of fact in a capital case you have to do more than that. In a capital case you have to give the name of every witness. I am not asking you to give the name of every witness:

For example, let's take these conversations. You may have some surveilling witnesses who were standing off at a distance and saw these two people converse at this time. They don't know what was said, but they can testify that there was such a conversation which will corroborate the testimony of the witness who says not only there was such a conversation, but this is what was said at it. Just as we have surveilling witnesses in narcotics cases. This is not different, in my judgment, than the relationship between the witness who is the undercover agent or the special informant or special employee in the narcotics case who makes the transaction, and two or three narcotics agents [fol. 108] are standing at some distance surveilling the transaction.

I am not asking you to give the names of all your witnesses by a long shot, but I am saying to you that if this is an essential element of the government's case, that is, that a conversation took place at a particular time and that something was said in that conversation, just like a transaction took place at a particular time and something was sold and bought in that transaction, then it seems to me you have the duty to tell the defendant where that transaction or where that conversation took place, what time of day or night and what day of the week and month it was and who was present, not surveilling, but actually participating in the transaction, who can testify as to what was bought or sold or testify as to what was said by one or another party to the conversation.

I cannot for the life of me see how you can justify refusing to give that information, and I can tell you now that if the government persists in that refusal, I am simply going to dismiss the indictment.

Mr. Schultz: Your Honor, may I make, or attempt to make, one distinction here. You are comparing this case with a bank robbery or narcotics buy—

The Court: I am not comparing it with a bank robbery. I was comparing it with a narcotics case. All right, take a bank robbery.

Mr. Schultz: A bank robbery where we might have a witness to the actual crime itself. In this case we are not talking about that at all.

The Court: No. No, I am not talking about a witness to the crime itself, Mr. Schultz. I am not talking about somebody who was in the bank and saw the robbery. I am [fol. 109] talking about somebody who was a robber or was a participant in the transaction, the teller on the other side. I am talking now about a person who was not an observer. I am talking about a person who was a principal in the transaction.

We are talking here about somebody to whom a statement was made by a defendant, from whom something was purchased by the defendant, to make the narcotics analogy. Not a bank robbery situation where you have a witness in the nature of a surveilling witness who observed what took place at a distance. I am talking about somebody who participated in it. It is not the same thing at all. Let's talk about a narcotics situation. That is a reasonable analogy.

The Supreme Court has required you to give the name of the undercover or special employee. A case went from this court to the Supreme Court—

Mr. Silets: The Roviaro case.

The Court: (Continuing)—with the holding that you had to disclose the identity of the special employee. Now you are talking about a person who had a conversation in which incriminating statements were presumably made which are going to be testified to, which are going to be used as evidence of the commission of a crime, and you say you are not going to tell them who the person was to whom these statements were made.

Mr. Schultz: And who was present and where they were made.

The Court: And who was present and where they were made and what time of day or night.

Mr. Silets: We renew our Motion, your Honor. I think the appropriate action is to dismiss the indictments. The [fol. 110] government has made it as clear as possible as to their position.

The Court: Is this the government's position?

Mr. Schultz: Yes, your Honor. It has to be, your Honor. We feel that it is beyond the Rules of the Criminal Procedure to give the names of witnesses who will testify to admissions or statements.

The Court: You keep talking about the names of witnesses. I keep telling you that these may or may not be witnesses. You tell me you are giving them a whole bunch of witnesses. I don't know whether these people from whom income was received which you allege was not reported are going to be witnesses or not. I don't know whether the person with whom the conversation was held is going to be a witness or not, or whether all the persons—you may have three or four people present and you may be only going to call one. They are entitled to see what the others might say to see whether they would give different testimony.

Let's suppose you have three people who were present at the conversation beside the defendant, and you call one of them. They don't even know the names of the other two until at the time of the trial. Now they have got to run around and see what those other two would testify to because you are not going to call them. You are not going to call them. My guess is that you are not going to call them because their testimony wouldn't be helpful, otherwise you would call them.

Mr. Schultz: If we were to represent to the Court that if there were any additional witnesses present we would have them available to the defendant at the time of the trial—

[fol. 111] The Court: Mr. Schultz, what is this great love of secrecy which you have in this situation? What psychic—almost psychotic, I started to say—satisfaction do you get out of refusing to disclose to the defendant the names of people who were present at a time in which they are alleged to have either violated the law, because I get the same resistance in narcotic cases, you know. I am told the same thing: this is giving our witnesses. The Supreme

Court finally cleared that up so there isn't any argument about it. Here at a time when an allegedly incriminatory admission was made which is going to be used—and let me say to you that an incriminating admission is just as devastating testimony as the testimony of the actual transaction itself. In some respects it is more devastating because the jury doesn't have to draw conclusions as to whether there was intent, whether the act was performed, because here in one neat little package the defendant has put the question of the act and intent and ended up admitting his guilt.

Now that is a much more devastating piece of testimony, so far as the defense is concerned, than the testimony of a special employee who handed across some money and got in exchange for it some narcotics because you can work on that cross examination with respect to what the circumstances were, whether it was entrapment, whether it was a whole lot of things.

An incriminating admission, a confession made to a third party, is the most devastating kind of evidence from the point of view of the defense. But you are not going to even tell them so they can prepare a reasonable alibi if he wasn't there or get other witnesses who were there. In other words, I cannot see what harm—I don't understand [fol. 112] what harm could come to your case from the disclosure to the defense of who was present. Not what was said because I have said to you that with respect to what was said, I am not going to order that where it is a third party. Where it is a statement to a government employee, yes, I will, but not where it is a third party.

Mr. Schultz: Your Honor, as we have stated in our briefs, as we have attempted to persuade you in oral argument—

The Court: All right.

Mr. Schultz: (Continuing)—it is not required in a criminal action for the government to give the witnesses, or the possible potential witnesses who will testify as to admissions made by the defendant. I think the reason for the rule is the government has no means of discovery. The

defense has all the means of discovery. The defendant has learned of the government's case. The government does not know the defendant's case. The defendant has the opportunity now to manipulate, the opportunity—and I am not assuming counsel would.

The Court: He also is presumed to be innocent; the government has the burden of proving his guilt beyond a reasonable doubt; there is no confession which can be used unless it is voluntary; and a whole host of things.

Mr. Silets: There is also this. Mr. Schultz is alluding, and I don't want the record to be unclear about it, that there is a possibility that this defendant and/or his counsel may manipulate evidence. If that is the case, the F.B.I., the United States Department of Justice and the United States Attorney's office have a great number of resources to prosecute.

[fol. 113] The Court: Mr. Silets, I cannot conceive of your clients in this case being so unwise or you being so unwise as to permit them to become involved in a much more serious crime.

Mr. Silets: Precisely.

The Court: Subornation of perjury or something of that sort, a much more serious crime than the crime they are charged with in this indictment, so the idea that the defendant would expose himself to a charge of tampering with a government witness is to me, in the absence of some kind of showing, just beyond belief. I cannot believe that the governments testimony is going to be changed one iota by disclosing this information.

I think the defendant's ability to meet it may be vastly different, depending on whether or not they have this information, but I think they are entitled to have this information. They are entitled to try to get the truth before the jury, get the truth before the Court.

All right. You are not going to give the information?

Mr. Schultz: Your Honor, I just did want to repeat, first, that I wasn't suggesting at all that Mr. Silets would do a thing of this sort. Secondly, I would repeat that if

the Court required the government to, we would have any witnesses present in court, or at least available, who heard the admissions or the confessions or were present at the time so that the defense wouldn't be caught without being able to secure these witnesses. We will have them in court, your Honor.

The Court: Suppose in fact the defense's position is that I wasn't in town that week, that day, or that month, and I have to establish this by testimony of everything from hotel registers to people in New York or in Florida or [fol. 114] someplace else who can testify I was there and not in Chicago at the time that conversation took place.

Mr. Schultz: There is that possibility, your Honor.

The Court: Of course, and it doesn't give an opportunity to interview the witnesses before the trial either. Why shouldn't they have an opportunity to interview the witnesses? Why should they put them on cold at the time, or why should I have to recess then while they go and interview the witnesses to see what their testimony would be?

I don't understand it, Mr. Schultz. I just don't understand in this situation—I can understand a lot of situations, but in this situation. We are not talking about some other case, but in this case, this case in which you say that there were incriminating admissions made.

Or, the alternative, Mr. Silets, I am not sure. I said I was going to dismiss this indictment, but I have a couple of other alternatives, it seems to me. One is simply to preclude any testimony of that kind being received at the trial in the absence of a refusal to disclose it in advance, which is one device available to me. Second is to give them a chance to let the Court of Appeals review this and see whether I am right or wrong before dismissing the indictment.

Mr. Schultz: Your Honor, the government does intend or does anticipate having the Court of Appeals review this.

The Court: All right. Now, the only question, for my money I don't think you are entitled to a free ride on this. I have been thinking about this. I don't think you are

entitled to have Mr. Silets' client pay the cost of appeal, et cetera, and then if you lose, then come back and say, now we will try the case, giving them the information.

[fol. 115] For my money, you ought to take this calculated risk. If you want to stand on your refusal, which seems to me to be purely arbitrary and unreasonable in this situation, then I think you ought to run the risk that in the event that you lose, that the Court of Appeals says, you know, Judge Will was right, this is reasonable information to disclose to the defendant in this situation; then you ought not to come back and say, okay, now we will disclose the information.

Mr. Silets: I don't think they can.

The Court: They can.

Mr. Schultz: If the Court of Appeals stays the order.

The Court: If the Court of Appeals stays the order of dismissal, they can.

Mr. Schultz: Your Honor, in the interest of justice, we think that if the government is wrong in this case, then the information should be supplied and the defendant should be tried.

The Court: Mr. Schultz, how long do you want? Two years from now, after they get through with the Supreme Court of the United States, because I know if the Court of Appeals says I am right and you are wrong, you will end up in the Supreme Court or try to get there on a petition for writ of certiorari, and if they lose in the Court of Appeals, they will go to the Supreme Court once they have this bear by the tail. Two or three years from now, assuming that the Supreme Court says that is right, you give them the information, then you are prepared to try the case on the basis of which I say now is reasonable that you should try the case.

No, I think they are entitled at that stage of the game having gone all the way as far as you can go in this matter [fol. 116] not to have to stand trial thereafter. I just don't think the government is entitled to have its cake and eat it too. That is what you are asking for.

Mr. Schultz: Your Honor, this is a bill of particulars propounded by the defendant. He is requesting something which is rather extraordinary, perhaps, and if the government is wrong—

The Court: Mr. Schultz, you keep talking as though this was something rather extraordinary. To me it is no different than the same kind of information that I have talked about earlier, which we require you to produce in case after case, and which the Supreme Court has now said you produce, even though the government took the same position, I would remind you, precisely the same position on the narcotics situation as you are taking here on the informant situation, and the two are substantially the same kind of people. They are people who are not government employees, who do a special job in a special situation and get paid for it. There is a great deal of analogy between the special employee in the narcotics case and the informant in this kind of case, and I assume we are talking about an informant—

Mr. Schultz: Not necessarily.

The Court: We are talking about a nongovernmental employee to whom incriminating admissions were made. That is an informant by definition, isn't it?

Mr. Galbraith: I don't think it is necessarily, your Honor. It could possibly—

The Court: You have the information.

Mr. Schultz: Yes, your Honor, in that sense it is.

The Court: Of course it is an informant. It is not somebody Mr. Silets knows his client made an admission [fol. 117] to. It is somebody you know his client made an admission to.

Mr. Schultz: Mr. Silets may know this, your Honor. We have no way of telling that.

Mr. Silets: If I knew, I wouldn't ask.

Mr. Schultz: That is not necessarily so. He has asked us to reproduce almost all the books of the corporation.

The Court: He might know or might not know. I think he is entitled not to have to guess. I think you are not

entitled to a free ride all the way to the Supreme Court and then back, and try the case on the same basis that I have told you to try it now.

If you win and I am wrong, fine, then Mr. Silets is going to have to try the case on the basis of not knowing and guessing. If you lose, however, I think you ought to have something at stake. You have got nothing at stake unless I dismiss this case.

Mr. Schultz: May we ask your Honor to reserve your ruling until this afternoon so that we might attempt to get a staying order, your Honor?

Mr. Silets: I would object to that, your Honor. I think the Court should enter its order now. If the Court of Appeals feels it should be stayed—

Mr. Schultz: It can't be stayed once it is entered.

Mr. Silets: Precisely. That is why I say, if the Court enters its order now dismissing the indictment—

The Court: At that point, Mr. Silets, they are hung with it and the Court of Appeals can't do anything about it except take the case one way or the other.

Mr. Silets: That is right, and we are willing to take the chance in the Court of Appeals that your Honor is right.

[fol. 118] Mr. Schultz: They are not taking any chance at all. The government is sacrificing a great deal in a case of this nature wherein we are possibly allowing a defendant—

The Court: Mr. Schultz, I don't know what you are talking about taking a chance. They are taking the chance that they will be spending the next two years litigating the question of whether or not you should have given them the information, which it seems to me patently reasonably you should have, and this will cost them some money at least, and they can end up still having to try the case.

Mr. Silets: We are willing to take that chance.

The Court: They are taking a chance.

Mr. Schultz: The longer it takes for the case to be tried, certainly the more difficult it is for the government to present its case. Certainly the more advantageous—

The Court: In this type of case that is not necessarily so. This is a bookkeeping case essentially.

Mr. Galbraith: Not necessarily, your Honor.

The Court: The books and records are not going to change very much. You are talking about unreported income and you have given them a tabulation, which I take it is immutable, of transactions—

Mr. Schultz: We have given them further tabulations than that, your Honor. We have given them about twenty pages of tabulations.

The Court: That is not going to change with the passage of time. What is going to change in the passage of time is the availability of live witnesses, who may be as important to the defense as to the government. I don't see that there is any advantage in this kind of a case from the defense point of view in delay. I will say in nine cases [fol. 119] out of ten delay works for the benefit of the defense, but I don't think it does necessarily in this case. I think in this case it could work either way.

Mr. Schultz: There is that possibility, of course.

Mr. Silets: Your Honor, I have submitted a draft order to both the Court and to counsel.

The Court: No, the draft order won't do because it says more than I intended to say. It talks about 25 in toto, and I am not going to require, for example, 25(d) to be given with respect to nongovernmental agents.

Mr. Silets: Might I suggest that your Honor enter a minute order then so we don't get into a bind with the Court of Appeals.

The Court: Mr. Silets, I am not going to foreclose the Court of Appeals from a chance to look at it. That doesn't seem to me to be fair at this stage.

Mr. Silets: They are going to file an appeal or mandamus against your Honor's order, and it will be reviewed in any event.

The Court: No, I am talking about the question of whether or not they should be required to go for broke on this, so to speak. I think they should. I will have this

written up so that the Court of Appeals judge can have it, and I think he should have it, and if there is any question about the information being available to the Court of Appeals in the form in which, it seems to me, they ought to consider it, I want to be sure that it doesn't come in the form in which you present it this morning, which I don't conceive to be an accurate statement of the dynamics and logistics of the situation.

Mr. Silets: Your Honor, I concur with the Court and [fol. 120] say, to use the Court's language, that they should go for broke, and I think the Court should enter its order and let the Court of Appeals review that order rather than to have this reviewed on a stay.

The Court: Mr. Silets, I don't want to prejudice the ultimate result on the question of the disclosure or non-disclosure of this information by having precluded the Court of Appeals from an opportunity of preserving the status quo if they think that is appropriate, so that the issue of whether or not this kind of information should be disclosed can be decided without regard to whether it means dismissal of the case or continuation of the case. I think they should go for broke. I have made that clear. I don't think they should have a free ride, and at the same time take you all the way to the Supreme Court. But I don't want the Court of Appeals to feel that it is in any way limited to its consideration of the case by the fact that the motion to dismiss has been granted, and therefore the only way they can get around that is to reverse on the question of the disclosure of this information. I want that question, if possible, decided.

Now if they agree that the government should go for broke, as I think they should, then they have only to refuse to issue a stay order. I will enter the order to dismiss this afternoon or tomorrow morning, and then we will have set the thing in perspective, so that the Court of Appeals cannot justifiably be impelled to reverse simply to get the case reinstated.

They will have had a chance to look at it and decide whether they think this is a relevant factor or not. I think that is sensible.

[fol. 121] Mr. Silets: May I suggest that the Court set two o'clock for entry of the order unless there has been a stay granted prior to that time?

The Court: I want to get this written up so that they have the benefit of it. I will set this tomorrow morning at ten.

Mr. Schultz: Thank you.

Mr. Silets: Might I suggest in consideration of the proposed order that your Honor give attention to the findings that I have suggested in the order?

The Court: Yes, obviously I will make some findings. In effect, I have made some orally from the bench this morning.

Mr. Silets: Thank you, your Honor.

Reporter's Certificate to foregoing transcript (omitted in printing).

[fol. 122]

CLERK'S NOTE

Memorandum Opinion dated and filed December 7, 1965 is omitted from the record here. It appears on pages 58-60 supra.

[fol. 125]

MOTION FOR ENTRY OF AN ORDER DIRECTING THE GOVERNMENT TO FURNISH PARTICULARS, OR, IN THE ALTERNATIVE, TO DISMISS INDICTMENTS—January 4, 1966

Now Comes the Defendant, Simmie S. Horwitz, by and through his attorneys, Harris, Burman and Silets, and respectfully moves this Court for the entry of an Order directing the United States of America to comply with the Order and Opinion of this Court entered November 29, 1965, and filed December 7, 1965, respectively, directing the Plaintiff to furnish a Bill of Particulars and, in support thereof, states as follows:

1. The Defendant filed his Motion for a Bill of Particulars on September 7, 1965, requesting some thirty particulars with respect to the captioned Indictments. On [fol. 126] November 29, 1965, this Court entered its Order granting Defendant's request, except as to particulars No. 4 and 29(b).

2. On December 3, 1965, the United States of America filed its Motion to vacate the Order of November 29, 1965, and grant leave to the Government to file a Memorandum in support of its Motion. Upon a full statement by the Government of its position, the Court took the matter under advisement.

3. On December 7, 1965, this Court filed its Memorandum Opinion denying the Government's Motion to vacate the Court's Order of November 29, 1965, with the exception of Request No. 25(d).

4. Though a reasonable period of time for the compliance with this Court's Order has elapsed, the Government has, to date, failed to comply with the Court's Order of November 29, 1965, and has completely failed to respond and give particulars with respect to Requests No. 14, 25, 28, and 29(a).

5. Further, the Government has failed to give sufficient particulars to constitute an adequate response to Requests No. 7, 11, 13, 16, and 24.

6. Further, with respect to Request No. 10 the Government has failed to specify which documents were obtained from corporate officers and Agents, and the specific dates so obtained.

Wherefore, the Defendant moves that this Court enter its Order directing the United States of America to furnish particulars with respect to Requests No. 14, 25, 28, and 29(a), as well as further particulars with respect to Requests No. 7, 11, 13, 16, and 24, within fifteen (15) days, [fol. 127] or, in the alternative, if the United States fails

to furnish the said particulars, that this Court enter its Order dismissing the Indictments.

Respectfully submitted,

....., Attorneys for Simmie S. Horwitz.

Certificate of Mailing (omitted in printing).

MOTION TO DISMISS INDICTMENTS—Filed January 4, 1966

Now Comes the Defendant, Simmie S. Horwitz, by and through his attorneys, Harris, Burman and Silets, and respectfully moves this Court for the entry of an Order dismissing the captioned Indictments and, in support thereof, states as follows:

1. The Government has declined to furnish Particulars No. 14, 25, and 29, which it had been ordered to furnish by this Court's Orders of November 29, 1965 and December 7, 1965.

2. This cause having come on to be heard at 10:00 A.M. on January 4, 1966, the Government again specifically declined to comply with this Court's previous Orders. The [fol. 128] Defendant thereupon made his Motion to dismiss the Indictments, and the Court denied the said Motion indicating it had no authority to do so. This Court in lieu thereof, in light of the Government's refusal, continued the matter indefinitely.

3. The Defendant respectfully represents to the Court that, in the face of a specific refusal of the United States to comply with the pre-trial Order to furnish particulars, the United States Supreme Court has indicated the District Court has the jurisdiction to dismiss the Indictments. Thus, in *Roviaro* v. *United States,* 353 U.S. 53, 1 L.Ed. 2nd 639, an Appeal from a conviction arising from this District Court, the United States Supreme Court had occasion to

review the alternatives available to the District Court when the Government declined to furnish the name and address of an informant. After holding that in the particular facts the name and address of the informant was important and relevant, the Court stated at page 64:

> "* * * However, we think that the Court erred also in denying, prior to the trial, Petitioner's Motion for Bill of Particulars, insofar as it requested John Doe's identity and address. Since Count 1 was then before the Court and expressly charged Petitioner with a sale of heroin to John Doe, it was evident from the face of the Indictment that Doe was a participant in and a material witness to that sale. *Accordingly, when his name and address were thus requested, the Government should have been required to supply that information or suffer dismissal of that Count.*" (emphasis supplied).

Similarly, in the case of *Jencks* v. *United States*, 353 U.S. 657, 672 (1957), the United States Supreme Court reviewed the possibilities when the Government refused (at a time when there was no specific statute relating to the issue) to [fol. 129] permit the Defendant to inspect certain statements or reports in the possession of the Government. It held that the criminal action must be dismissed, stating:

> "We hold that the criminal action must be dismissed when the Government, on the ground of privilege, elects not to comply with an order to produce, for the accused's inspection and for admission in evidence, relevant statements or reports in its possession of Government witnesses touching the subject matter of their testimony at the trial."

4. The Defendant cannot be held to await indefinitely the pleasure of the Government in the face of its blatant and unmitigated refusal to comply with this Court's Orders. The effect of this Court's direction to continue the

matter indefinitely is to permit the Government to affect a long delay of prosecution which hangs like the sword of Damocles over the Defendant, in violation of his rights under the Sixth Amendment to the Constitution of the United States to a speedy trial.

Wherefore, the Defendant prays for the entry of an Order dismissing the Indictments on the grounds set forth above, or, in the alternative, on the grounds that the Government has denied to the Defendant a speedy trial, pursuant to his rights granted under the Sixth Amendment to the Constitution of the United States.

Respectfully submitted,

....., Attorneys for Simmie S. Horwitz.

[fol. 130]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Before Hon. Elmer J. Schnackenberg, Circuit Judge, Hon. Win G. Knoch, Circuit Judge, Hon. Roger J. Kiley, Circuit Judge.

No. 15607

UNITED STATES OF AMERICA, Petitioner,

vs.

HONORABLE HUBERT L. WILL, Judge, United States District Court for the Northern District of Illinois, Respondent.

ORDER DENYING PETITION FOR WRIT OF MANDAMUS—
July 12, 1966

This is a petition by the government for writ of mandamus to compel respondent, a district court judge, to vacate his order which effectually directs the government

in a criminal cause to give the defendant names and addresses of persons to whom defendant in said cause made oral statements to support the charges in the indictments. Briefs have been filed in this court by both parties. The court has considered the briefs and is fully informed of the points made and the positions of the parties with respect to the issue, and

The court finds that the order subject of the petition is not an appealable order, and a review of it would offend the policy against piecemeal appeals in criminal cases, *Cobbledick* v. *United States,* 309 U.S. 323; that mandamus may not be used as a means of reviewing the non-appealable order, *Roche* v. *Evaporated Milk Association,* 319 U.S. 21; that federal courts use mandamus for the traditional purpose of confining a district court to a lawful exercise of its jurisdiction or to compel it to exercise its proper juris- [fol. 131] diction, *Roche* v. *Evaporated Milk Association;* that the district judge's order upon the government to furnish names and addresses of witnesses to a defendant may be erroneous, a question we do not decide, but the ruling itself was within the court's jurisdiction, *Roche* v. *Evaporated Milk Association;* that the ruling can be reviewed on appeal from a final judgment; and that there is no question here that the district judge refused to exercise his proper jurisdiction.

It Is Therefore Ordered that the petition for writ of mandamus be and it is hereby denied.

[fol. 132]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Before Hon. Elmer J. Schnackenberg, Circuit Judge, Hon. Win G. Knoch, Circuit Judge, Hon. Roger J. Kiley, Circuit Judge.

[Title omitted]

ORDER—August 16, 1966

This cause came on to be heard upon the government's Petition For Reconsideration of the Order of July 12, 1966, and for a hearing on the merits, and upon the opposition of respondent to the granting of the petition; and the court being fully advised has reconsidered its order of July 12, 1966:

The court finds that in the circumstances of this particular case the court should consider the merits of the ruling of the district court challenged by the government, rather than to remit the government to a radical alternative appealable judgment available to the trial judge upon the government's persistent refusal to comply;

It is therefore ordered that the order of this court of July 12, 1966, be and it is hereby vacated, and the cause is taken by the court upon the petition for the writ, the briefs of both parties and the record.

[fol. 133]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Before Hon. Elmer J. Schnackenberg, Circuit Judge, Hon. Win G. Knoch, Circuit Judge, Hon. Roger J. Kiley, Circuit Judge.

[Title omitted]

ORDER DIRECTING THAT WRIT OF MANDAMUS ISSUE—October 4, 1966

This cause came on to be heard upon the Government's petition for writ of mandamus ordering respondent to vacate his order directing the Government to answer question 25 in defendant's motion for bill of particulars, which question sought, among other things, the names and addresses of persons to whom defendant made oral statements supporting the indictment charging wilful evasion of income tax, and which statements the Government would rely upon at the trial; upon the rule issued upon respondent to show cause why the writ should not issue; upon the brief of respondent answering the rule, and the brief of the Government; and upon the record.

And the Court having on August 16, 1966 vacated its July 12, 1966 order denying the writ, and having reconsidered the question,

It Is Ordered that a writ of mandamus issue as prayed in the Government's petition directing respondent to vacate his order directing the Government to answer question 25 in defendant's motion for bill of particulars.

[fol. 134]

Respondent's Petition for Rehearing En Banc covering 8 pages filed October 19, 1966 omitted from this print. It was denied, and nothing more by order. December 5, 1966.

[fol. 135]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Before Hon. John S. Hastings, Chief Judge, Hon. Elmer J. Schnackenberg, Circuit Judge, Hon. Win G. Knoch, Circuit Judge, Hon. Latham Castle, Circuit Judge, Hon. Roger J. Kiley, Circuit Judge, Hon. Luther M. Swygert, Circuit Judge, Hon. Thomas E. Fairchild, Circuit Judge, Hon. Walter J. Cummings, Jr., Circuit Judge.

[Title omitted]

ORDER DENYING PETITION FOR A REHEARING EN BANC—
December 5, 1966

It Is Ordered by the Court that the petition for a rehearing *en banc* of this cause be, and the same is hereby Denied.

(Cummings, C.J. voted to grant petition for rehearing en banc)

[fol. 136] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 137]

SUPREME COURT OF THE UNITED STATES

No. 918—October Term, 1966

HUBERT L. WILL, Judge, United States District Court for the Northern District of Illinois, Petitioner,

v.

UNITED STATES.

ORDER ALLOWING CERTIORARI—March 13, 1967

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

HONORABLE HUBERT L. WILL, Judge, United States District Court for the Northern District of Illinois,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No.

HONORABLE HUBERT L. WILL, Judge, United States District Court for the Northern District of Illinois,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To The Honorable, The Chief Justice and Associate Justices of The Supreme Court of the United States:

Petitioner respectfully prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Seventh Circuit entered on October 4, 1966, ordering that a writ of mandamus issue against petitioner directing him to vacate his order upon the re-

spondent to answer question 25 in defendant's motion for bill of particulars in the case entitled *United States of America* v. *Simmie S. Horwitz,* No. 65 CR 464; pending before petitioner in the United States District Court for the Northern District of Illinois, Eastern Division.

CITATION TO OPINIONS BELOW

The order of the United States Court of Appeals for the Seventh Circuit was entered on October 4, 1966 and has not been reported. The opinion of Petitioner has not been reported.

JURISDICTION

The order of the United States Court of Appeals for the Seventh Circuit was entered on October 4, 1966, and a timely petition for rehearing *en banc* was denied on December 5, 1966. The jurisdiction of this Court is involved under 28 U.S.C., 1254(1); 62 Stat. 928.

QUESTIONS PRESENTED

1. Does a Court of Appeals have jurisdiction to issue a writ of mandamus to prohibit a District Court from directing the Government to furnish a request for a bill of particulars where there is no statutory authority for an appeal by the Government from such order, and where the District Court has lawfully exercised its prescribed jurisdiction?

2. Can a Court of Appeals substitute its discretion for that of a District Court by the issuance of a writ of mandamus preventing the District Court from requiring the Government to furnish a bill of particulars which may disclose, in part, the names of some prospective witnesses?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Because of the number and length of the constitutional provisions and statutes involved, they are set forth as Appendix G, page App. 11-14, *infra.*

STATEMENT OF THE CASE.

Petitioner is a Judge of the United States District Court for the Northern District of Illinois. Pending before him are two indictments brought by the United States against one Simmie S. Horwitz for making and subscribing false corporate income tax returns in violation of Section 7206(1), Internal Revenue Code, 1954 (26 U.S.C. 7206 (1)). After entering a plea of not guilty, the defendant filed several motions with petitioner, including a motion for bill of particulars. This petition is directed against the writ of mandamus issued by the Court of Appeals for the Seventh Circuit directing petitioner to vacate his order granting request 25 of the requested particulars.

Request 25 and request 24 (A. 13)[1] upon which it is predicated reads as follows:

Request 24 is as follows:

> "24. Does the Government rely upon any oral statements of the defendant to support the charge in the several counts of the indictments?"

[1] Since the matter arose in the Court of Appeals on the Government's Petition for Writ of Mandamus, all record references are to appendices filed by the parties in that court. "A" refers to Government's Appendix; "S.A." refers to Petitioner's Supplemental Appendix.

Request 25 is as follows:

"25. If the answer to Request No. 24 is in the affirmative, state with respect to each such statement, if there was more than one:

(a) the name and address of the person to whom the statement was made;

(b) the date on which the statement was made;

(c) the place where it was made;

(d) the substance of the statement;

(e) whether the person to whom the statement was made was a Government agent at the time of the statement;

(f) the names and addresses of any other person present at the time the statement was made; and

(g) whether a written memorandum or verbatim transcript of the oral statement was made, and if so, whether the Government has possession of the memorandum or transcript."

Following petitioner's grant of this request (A. 3, S.A. 1-2), the Government filed a motion to vacate his order with respect thereto as well as to other granted requests not here material. (A. 3) The grounds urged for the motion relating to request 25 was that it required the government to furnish the defendant a list of witnesses. (S.A. 7-18) Vigorously disputing this interpretation, (S.A. 7, 14, 15, 17-18) petitioner nevertheless took the matter under advisement (S.A. 18)

Thereafter, petitioner filed his memorandum opinion denying the Government's motion to vacate his order. (S.

A. 54-57) After concluding that the proper scope of a bill of particulars is a question left largely to the sound discretion of the trial judge (S.A. 54), petitioner analyzed the request and specifically rejected the contention that a list of witnesses would thereby be furnished:

> "It is by no means clear that the names thus provided will be a list of witnesses to be called by the prosecution. That some may be called is obvious. However, it is equally obvious that not all must necessarily be called and customarily are not. Also equally obvious is the fact that others besides persons present at such times may be called as witnesses as, for example agents who investigated transactions involving the defendant by interviewing the other parties thereto, accounting witnesses who testify to computations made by them, etc. The reason for requiring disclosure of their names, however, is not that they will or may be witnesses, but that the defendant requires identification of the times, places and persons present in order to prepare his defense. Moreover, if the government has any basis for contending that such disclosure will involve physical risk to the individuals or prejudice the government in its ability to produce its evidence, they have not so indicated. Absent such a showing, the defendant is entitled to have the information." (S.A. 55-56).

Finally, petitioner restricted the language of the request seeking information "on which the government relies" to mean information "as that which the government deems relevant and material rather than all such information in the government's possession." (S.A.57) Petitioner thereupon affirmed his prior order granting request 25.

The government, however, failed to file an answer to the request (A. 25). Defendant filed a motion for the entry of an order directing the government to furnish the par-

ticulars, or in the alternative to dismiss the indictments (S.A. 57-59), but the government again refused to comply, contending it would be giving "a list of a substantial number of the government witnesses." (S.A. 20). Petitioner, initially continued the case indefinitely until such time as the Government answered, (S.A. 21) but thereafter, upon objection by the defendant, the motion was continued for sixty days to give the government time to answer or possibly suffer dismissal (S.A. 23).

At the expiration of the sixty days, the government requested a week to reconsider its position (S.A. 32). Petitioner indicated that if the government was unwilling to give the information requested, he would dismiss the indictment (S.A. 32). Thereafter, the government again refused to comply with petitioner's order. In the colloquy between Court and counsel, the information sought by request 25 was further circumscribed to those statements which "were material to the proceedings" (S.A. 36). The government conceded its position sufficiently to agree to furnish statements in the form of admissions made to government agents. (S.A. 37)[2]. But, in spite of petitioner's specific findings that the same was not a direction to furnish a list of witnesses (S.A. 39, 40, 42) the government persisted in refusing to give the answers to request 25 which related to statements made to non-government agents. (S.A. 37)

Petitioner delayed the entry of his proposed order (S.A. 53) and in the interim, the government filed in the United States Court of Appeals for the Seventh Circuit its Emergency Petition For Stay Order Pending Filing of Petition

[2] To date, this information has not been furnished the defendant (A. 6).

For Mandamus which was granted. Leave first having been obtained, a petition for writ of mandamus was filed. A Rule To Show cause was thereupon issued against petitioner and after taking the matter upon briefs without oral argument, the Court of Appeals denied the petition for writ of mandamus, holding:

> "The Court finds that the order subject to the petition is not an appealable order, and a review of it would offend the policy against piecemeal appeals in criminal cases, *Cobbledick* v. *United States,* 309 U.S. 323; that mandamus may not be used as a means of reviewing the non-appealable order, *Roche* v. *Evaporated Milk Association,* 319 U.S. 21; that federal courts use mandamus for the traditional purpose of confining a district court to a lawful exercisce of its jurisdiction or to compel it to exercise its proper jurisdiction, *Roche* v. *Evaporated Milk Association;* that the district judge's order upon the goveriment to furnish names and addresses of witnesses to a defendant may be erroneous, a question we do not decide, but the ruling itself was within the court's jurisdiction, *Roche* v. *Evaporated Milk Association;* that the ruling can be reviewed on appeal from a final judgment; and that there is no question here that the district judge refused to exercise his proper jurisdiction.
>
> "IT IS THEREFORE ORDERED that the petition for writ of mandamus be and it is hereby denied." (App. C, p. 6)

Thereafter, upon the Government's Petition for Reconsideration of that order, the Court of Appeals reversed itself and undertook to consider the petition:

> "The court finds that in the circumstances of this particular case the court should consider the merits of the ruling of the district court challenged by the

government, rather than to remit the government to a radical alternative appealable judgment available to the trial judge upon the government's persistent refusal to comply;

"It is therefore ordered that the order of this court of July 12, 1966, be and it is hereby vacated, and the cause is taken by the court upon the petition for the writ, the briefs of both parties and the record." (App. D, p. 7)

Upon reconsideration, and without opinion, it finally ordered that a writ of mandamus issue directing your petitioner to vacate his order directing the government to answer question 25 in defendant's motion for bill of particulars. (App. E, pp. 8-9)

REASONS FOR GRANTING THE WRIT

1. The issuance by the Court of Appeals of the extraordinary writ of mandamus to review the exercise of discretion of a District Court in granting a bill of particulars effects a substantial departure from the present judicial administration of the Federal Rules of Criminal Procedure and constitutes such a grave expansion of the government's rights of review in criminal proceedings as to materially alter the trial of criminal cases in the Federal Courts. The decision of the Court below is in conflict with a decision of the Court of Appeals for the Second Circuit.

The decision of the Court below presents for the first time the proposition that the government may gain review of the exercise of discretion by a District Court in granting a bill of particulars. Yet, were the exercise of that discretion adverse to the defendant by a refusal of the particulars, it is clear that no review from that decision would be available to the accused. *Copp* v. *United States*, 168 F. 2d 190 (1st Cir., 1948); see also *DeBella* v. *United States*, 369 U.S. 121 (1962).

The ability of the government to appeal in a criminal case is confined to the grant contained in 18 U.S.C. 3731 and to the limited application of 18 U.S.C. 1404, but neither section permits of appeal in the instant situation. Moreover, since appellate review in criminal cases is limited to final decisions, 28 U.S.C. 1291, *Parr* v. *United States*, 351 U.S. 513 (1956), the effect of the grant of the extraordinary writ of mandamus to review petitioner's interlocutory order is to avoid the statutory conditions of appellate review and thwart the well established policy

against piecemeal appeals. *Cobbledick* v. *United States* 309 U.S. 323 (1940); *United States Alkali Export Association* v. *United States,* 325 U.S. 196 (1945); *Roche* v. *Evaporated Milk Association,* 319 U.S. 21 (1943); *United States ex rel. Potts* v. *Rabb,* 147 F.2d 225 (3rd Cir. 1945) cert. den. 324 U.S. 870 (1945). In addition, because the court below would have no appellate jurisdiction in the first instance over this unfavorable ruling to the government, the use of the writ of mandamus effected review of an otherwise unreviewable order. *LaBuy* v. *Howes Leather Co.,* 352 U.S. 249, 255 (1957); *Roche* v. *Evaporated Milk Association,* 319 U.S. 21 (1943).

The writ of mandamus cannot be used when "the most that could be claimed is that the District Courts have erred in ruling on matters within their jurisdiction." *Parr* v. *United States,* 351 U.S. 513, 520 (1956); *Schlagenhauf* v. *Holder,* 379 U.S. 104, 112 (1964). The power granted to the Court of Appeals by the All Writs Act (28 U.S.C. 1651(a) is not an appellate power but merely an auxiliary power and should not be availed of to correct mere errors in the exercise of conceded judicial power, although it may possibly be used to prevent usurpation of power, if "the lower court is *clearly* without jurisdiction." *Ward Baking Co.* v. *Holtzoff,* 164 F.2d 34, 36 (2nd Cir., 1947) (emphasis added). See also *Schlagenhauf* v. *Holder,* 321 F.2d 43, 48 (7th Cir., 1963) vacated and remanded on other grounds, 379 U.S. 104 (1964).

Certainly the writ cannot issue as here, to permit a Court of Appeals to exercise the discretion entrusted by law to the district court. *Fisher* v. *Delehant,* 250 F. 2d 265 (8th Cir., 1959); *Goldberg* v. *Hoffman,* 226 F.2d 681 (7th Cir., 1955). Yet, it is abundantly clear, that the granting or denial of a request for a bill of particulars is precisely

just that, the exercise of discretion. *Wong Tai* v. *United State,* 273 U.S. 77, 82 (1927). Moreover, since the petitioner's exercise of that discretion cannot, by any means, be viewed clear abuse thereof, the issuance of the writ in these circumstances does not prevent the trial court from acting beyond its jurisdiction, but would impermissibly substitute the lower Court's discretion for that of the district court. *Platt* v. *Minnesota Mining & Manufacturing Co.,* 376 U.S. 240, 245 (1964).

These propositions were in fact accepted and relied upon by the Court below in its Order of July 12, 1966 denying the Petition for Writ of Mandamus (App. C). In spite of the realization that the only correct means available to the Government for review of petitioner's Order was a final appealable order, the court reversed itself concluding that it would not "remit the government to a *radical alternative appealable judgment* available to the trial judge upon the government's persistent refusal to comply" (App. D, p. 7). (emphasis added). Thus the basis for the issuance of the writ of mandamus became the unwillingness of the Court of Appeals to force the representative of the United States to face the "radical alternative" of a final appealable order: presumably holding him in contempt for failing to comply with petitioner's order.

This is not a sufficient reason to authorize the issuance of the extraordinary writ. Other government officials have subjected themselves to findings of contempt in order to obtain review of a lower court order, *Tuohy* v. *Ragen,* 340 U.S. 462 (1951); *Giancana* v. *Johnson,* 335 F.2d 372 (7th Cir., 1964). Nor should this Court permit a new theory of the applicability of the writ of mandamus to be thus engrafted into the course of the judicial process.

If the decision below is permitted to stand, a Pandora's box will have been opened in the administration of criminal justice. Unless this Court acts, the Government will henceforth, through the use of the writ of mandamus, obtain a backdoor review of interlocutory orders which it finds objectionable. This ability also raises serious due process considerations, since a defendant, unlike the Government must suffer a "radical alternative appealable judgment" (of conviction) in order to obtain review of an unfavorable ruling on his request for bill of particulars.

Finally, the decision below is in direct conflict with the holding of the Second Circuit in *United States* v. *Bondy*, 171 F.2d 642 (1948). There the Government sought a writ of mandamus from the grant of a bill of particulars, claiming that by the terms of the order the Court had acted beyond his jurisdiction and that the order was so sweeping as to impose impossible standards of precision in pleading and in effect to "require the United States to furnish the defendants in advance of the trial the evidence to be used against them." (p. 643). Holding that the lower court had jurisdiction to grant a bill of particulars, the writ was denied:

> "The most that can be urged is that the order was so sweeping as to amount to an abuse of discretion; it did not deal with matters beyond the Court's jurisdiction." (p. 644)

Petitioner acted within his jurisdiction pursuant to Rule 7(f) of the Federal Rules of Criminal Procedure and duly exercised his discretion in granting request 25. The issuance of the writ of mandamus by the court below is a substantial departure from the present judicial administration of the Federal Rules of Criminal Procedure. That action constitutes a grave expansion of the government's

right of review in criminal proceedings which will materially alter the trial of criminal cases in the Federal Courts and which raises important due process considerations. In addition, the decision of the Court below is in conflict with the holding of the Court of Appeals for the Second Circuit.

2. The decision below raises important questions regarding the right of a Court of Appeals to substitute its discretion for that of the trial judge in granting a bill of particulars and as to the scope of discretion permitted under Rule 7(f) Federal Rules of Criminal Procedure.

This Court in its supervisory capacity over the administration of the Federal Courts has been ever watchful over the conduct of the various courts. (Sup.Ct.R. 19). Here is presented for the first time the novel question as to what extent may the exercise of discretion of a District Court *granting* a bill of particulars be substituted by the discretion of a Court of Appeals.

It has become axiomatic that where the District Court has exercised its discretion in *refusing* a bill of particulars, unless there is an abuse of that discretion, the action of the court should not be disturbed, since the application is one addressed to the sound discretion of the Court. *Wong Tai* v. *United States,* 273 U.S. 77, 82 (1927). In ascertaining whether the refusal constitutes an abuse of discretion the lower courts have attempted to determine whether the defendant has thereby been prejudiced, subjected to surprise and deprived of opportunity to prepare for trial, *United States* v. *McGuire,* 347 F.2d 99, 101 (6th Cir. 1965) cert. den. 382 U.S. 826; *United States* v. *Doyle,* 234 F.2d 788, 794-5 (7th Cir. 1956) cert. den. 352 U.S. 893 (1956).

Since this issue of abuse of discretion is founded in due process considerations to the defendant under the Fifth Amendment to the Constitution, it is small wonder that we have found no reported cases holding that a *grant* of the bill of particulars constitutes an abuse of discretion. Thus, the only conceivable basis for the action of the Court below substituting its discretion for that of petitioner is to conclude that petitioner either had *no* discretion whatsoever to grant the request or that the exercise of his admitted discretion was beyond his jurisdiction. The former is clearly not the law *Wong Tai* v. *United States*, 273 U.S. 77, 82 (1927) and the latter should clearly not be. Interestingly enough, the lower Court initially avoided the question whether petitioner's order was erroneous, but concluded "the ruling itself was within the Court's jurisdiction." (App. C, p. 6).

The contested request, number 25, seeks information pertaining to oral statements made by the defendant upon which the "'Government relies" (A. 13) to support the charges of the indictment. Included are requests for the names of the persons, to whom they were made, whether they were government agents, who else was present, where and when they occurred, and whether there is a memorandum thereof.

Since the Government consented to furnishing the answer to this request as it applied to statements made to government agents (S.A. 36), the sole portion of the request in contest is as to oral statements made to non-government agents (S.A. 37).

The Government's persistent refusal is founded upon their contention that it would thereby furnish the defendant "a list of a substantial number of the government witnesses." (S.A. 20). Since the court below wrote no opinion,

petitioner must conclude that this position, reiterated in the government's petition for writ of mandamus, was adopted by the Court of Appeals, though in the order of July 12, 1966 they declined to consider that question (App. C, p. 6).

Petitioner specifically found however, that the names to be provided in answering the request was not a list of witnesses, even though some of the persons named might, but not necessarily, be called as witnesses. (S.A. 55-56). Predicating his order within the scope and purpose of Rule 7(f) F.R.Cr.P., Petitioner concluded:

> "The reason for requiring disclosure of their names, however, is not that they will or may be witnesses, but that the defendant requires identification of the times, places and persons present in order to prepare his defense." (S.A. 56)

Several decisions have granted motions for the names of persons involved in the alleged crime, and in one case, *United States* v. *Solomon,* 26 F.R.D. 397, 407 (S.D. Ill., 1960), a request for the names of all persons with knowledge of facts relevant to the transactions in the indictment was granted: "In a proper case, a bill of particulars may require the disclosure of the identity of witnesses or persons who have knowledge of the transaction charged." See also, *United States* v. *Guterma,* 179 F. Supp. 417 (S.D. N.Y., 1959) (names of people present at origin of the deception scheme); *United States* v. *Vasquez,* 25 F.R.D. 350 (S.D. N.Y., 1958) (names of persons to whom defendant sold narcotics); *United States* v. *Pignone,* 189 F. Supp. 532 (D.C. Conn., 1960) (names of alleged co-conspirators). The mere fact that certain of the information sought by a motion for bill of particulars may involve the revelation

of evidence is not fatal to the demand where justice appears to require it. *United States* v. *Bentvena,* 193 F.Supp. 485 (D.C.N.Y., 1960).

By no means can the grant of the subject request be considered the giving a list of witnesses; but, even if it were, it is clear that petitioner had discretion to do so and acted within his jurisdiction in granting the request. There is no prohibition in either the Federal Rules of Criminal Procedure or in the statutes[3] precluding the exercise of the broad right of discretion contained in Rule 7(f) F.R.Cr.P.

There is no fixed rule with respect to disclosure of the identity of persons of this sort. The problem, if any, is one which calls for the balancing of the public interest in protecting the flow of information against the individual's right to prepare his defense. Where, as here, the District Court has determined that a proper balance of these two policies, taking into consideration the particular circumstances of the case and the nature of the crime charged, the possible defenses, the possible significance of the persons' testimony and other relevant factors, and especially in light of the court's specific finding that such disclosure involves no physical risk to such persons,[4] then

---

[3] Though 18 U.S.C. 3432 requires giving a list of witnesses in capital cases, there is no prohibition in non-capital cases should the court order it. Indeed, in *United States* v. *Van Duzee,* 140 U.S. 169, 173 (1891) this court impliedly acknowledged the power of the court to do so.

[4] "Moreover, if the Government has any basis for contending that such disclosure will involve physical risk to the individuals or prejudice the Government in its ability to produce its evidence, they have not so indicated. Absent such a showing the defendant is entitled to have the information." (S.A. 56)

the petitioner's ruling cannot be held to be other than an exercise of discretion within the court's jurisdiction. See *Scher* v. *United States,* 305 U.S. 251 (1938) and *Roviaro* v. *United States,* 353 U.S. 53 (1957).

To permit the Court below to substitute its discretion for that of petitioner is an impermissible exercise of the use of the writ of mandamus. *Platt* v. *Minnesota Mining & Manufacturing Co.,* 376 U.S. 240, 245 (1964):

> "Here, however, the Court of Appeals undertook a de novo examination of the record and itself exercised the discretionary function which the rule commits to the trial judge. This the Court should not have done since the writ cannot be used 'to actually control the decision of the trial court' *Bankers Life & Casualty Co.* v. *Holland,* 346 U.S. 379, 383, 98 L.Ed. 106, 111, 74 S. Ct. 145 (1953)."

Nor was the exercise of petitioner's discretion the creation of a new unauthorized rule, c.f., *Miner* v. *Atlass,* 364 U.S. 641 (1960), or a failure to folow the proscriptions of the existing rules, *United States* v. *Igoe,* 331 F.2d 766 (7th Cir. 1964) cert. den. 380 U.S. 942 reh. den. 380 U.S. 989 (1964).

Should the Court of Appeals be permitted to substitute its interlocutory discretion for that of the trial court, that court will have assumed to itself a heretofore inviolate right of trial discretion granted to the District Judge. The instant exercise of that discretion, even if "so sweeping as to amount to an abuse of discretion . . . did not deal with matters beyond the Court's jurisdiction" *United States* v. *Bondy,* 171 F.2d 642, 644 (2d Cir. 1948). Since Since petitioner had the jurisdiction to act, and did act in the exercise of his discretion, the Court of Appeals cannot interpolate a new and unprecedented authority unto itself "to actually control the decision of the trial Court."

Bankers Life & Casualty Co. v. *Holland*, 346 U.S. 379, 383 (1953). To hold otherwise would restrict and confine District Courts to a narrow interpretation of "discretion" and effectively limit an otherwise broad authority of the District Court.

The decision of the Court below will have a portentous effect on the administration of justice in the District Courts. It will cast a hitherto settled area of criminal procedure into areas not authorized by Congress and not approved by the Supreme Court. In direct conflict with the Second Circuit, it will not only permit the Government the right of piecemeal appeal from interlocutory orders unfavorable to it in criminal cases and thereby force Appellate Courts into the role of granting advisory opinions, but it will severely limit a previously broad power of discretion of trial judges.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari to review the judgment of the Court of Appeals for the Seventh Circuit should be granted.

Respectfully submitted,

HARVEY M. SILETS,
Counsel for Petitioner

7 South Dearborn Street
Chicago, Illinois

APPENDIX A.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Tuesday, March 15, 1966

Before

HON. LUTHER M. SWYGERT, *Circuit Judge*
HON. .....
HON. .....

UNITED STATES OF AMERICA,
Petitioner,
No. 15607 vs.
HONORABLE HUBERT L. WILL, Judge, United States District Court for the Northern District of Illinois,
Respondent.

Upon consideration of the emergency petition of the United States of America for a stay order pending filing of a petition for mandamus, It Is Ordered that said stay be granted and all proceedings in Case No. 65 CR 432, *United States* v. *Simmie S. Horwitz,* and in Case No. 65 C 464, *United States* v. *Simmie S. Horwitz,* pending before Honorable Hubert L. Will, Judge of the United States District Court for the Northern District of Illinois, be stayed until further order of this Court.

And, It Is Further Ordered that the United States of America, Petitioner, be granted leave to file its petition for mandamus to vacate the order directing petitioner to answer Item 25(a), (b), (c), (e), (f) and (g) of the Bill of Particulars by Monday, March 21, 1966.

APPENDIX B.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

March 24, 1966

Before

HON. JOHN S. HASTINGS, *Chief Judge*
HON. F. RYAN DUFFY, *Circuit Judge*
HON. LUTHER M. SWYGERT, *Circuit Judge*

UNITED STATES OF AMERICA, *Petitioner,*		
No. 15607	vs.	Rule to Show Cause
HONORABLE HUBERT L. WILL, Judge, United States District Court for the Northern District of Illinois, *Respondent.*		

On June 15, 1965, indictment No. 65 Cr 432 was returned to the District Court for the Northern District of Illinois, charging Simmie S. Horwitz with a violation of Title 26 U. S. Code § 7206(1);

On June 29, 1965, indictment No. 65 Cr 464 was returned to the District Court for the Northern District of Illinois, charging Simmie S. Horwitz with a similar but distinct violation of Title 26 U. S. Code, § 7206 (1). At subsequent proceedings, these two indictments have been considered on a consolidated basis;

On September 7, 1965, defendant filed a motion in the alternative for a bill of particulars. Thereafter, the Government filed an answer in opposition to defendant's motion for a bill of particulars;

On November 29, 1965, the District Court entered an order granting defendant's motion for a bill of particulars except as to 4 and 29(b);

On December 3, 1965, the Government filed a motion to vacate the Court's order of November 29, 1965, with respect to particulars 7, 14, 25, 28 and 29(a). This motion was denied, and the Government has filed answer to all questions contained in defendant's bill of particulars as directed by the Court except questions 25 (a)(b)(c)(e)(f) and (g);

On March 15, 1966, on petition of the Government, this Court granted a stay of all proceedings until further order of the Court and granted the government leave to file its petition for mandamus to vacate the District Court's order directing the Government to answer certain items of the bill of particulars by March 21, 1966;

Petitioner, United States of America, citing *Bowman Dairy* v. *United States,* 341 U.S. 214, *Atlass* v. *Miner,* 7 Cir., 265 F.2d 312, 319 and *Miner* v. *Atlass,* 363 U.S. 461, and claiming the District Court has attempted to extend criminal discovery beyond the provisions of the Federal Rules of Criminal Procedure and the law, and protesting that under established law, the Government need not disclose a list of its witnesses to the defendant in advance of trial, has requested this Court to issue a writ of mandamus directed to Honorable Hubert L. Will, Judge of the United States District Court for the Northern District of Illinois, who signed the orders hereinbefore described;

And the Court being fully advised;

It Is Ordered, that the said Honorable Hubert L. Will, Judge of the United States District Court for the Northern District of Illinois, show cause within twenty (20) days of the date of this order, why a writ of mandamus should not issue from this Court ordering the said Honorable Hubert L. Will to vacate the Court order signed by him directing the Government to answer question 25 contained in defendant's motion for a bill of particulars; and

It Is Further Ordered, that pending the decision of this Court on the issues hereinbefore stated, the United States of America need not answer Question 25 contained in defendant's motion for a bill of particulars.

APPENDIX C.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

July 12, 1966

Before

HON. ELMER J. SCHNACKENBERG, *Circuit Judge*
HON. WIN G. KNOCH, *Circuit Judge*
HON. ROGER J. KILEY, *Circuit Judge*

UNITED STATES OF AMERICA,
Petitioner,

No. 15607 vs.

HONORABLE HUBERT L. WILL, Judge, United States District Court for the Northern District of Illinois,
Respondent.

Petition for Writ of Mandamus

ORDER

This is a petition by the government for writ of mandamus to compel respondent, a district court judge, to vacate his order which effectually directs the government in a criminal cause to give the defendant names and addresses of persons to whom defendant in said cause made oral statements to support the charges in the indictments. Briefs have been filed in this court by both parties. The court has considered the briefs and is fully informed of the points made and the positions of the parties with respect to the issue, and

The court finds that the order subject of the petition is not an appealable order, and a review of it would offend the policy against piecemeal appeals in criminal cases, *Cobbledick* v. *United States,* 309 U.S. 323; that mandamus may not be used as a means of reviewing the non-appealable order, *Roche* v. *Evaporated Milk Association,* 319 U.S. 21; that federal courts use mandamus for the traditional purpose of confining a district court to a lawful exercise of its jurisdiction or to compel it to exercise its proper jurisdiction, *Roche* v. *Evaporated Milk Association;* that the district judge's order upon the government to furnish names and addresses of witnesses to a defendant may be erroneous, a question we do not decide, but the ruling itself was within the court's jurisdiction, *Roche* v. *Evaporated Milk Association;* that the ruling can be reviewed on appeal from a final judgment; and that there is no question here that the district judge refused to exercise his proper jurisdiction.

It Is Therefore Ordered that the petition for writ of mandamus be and it is hereby denied.

A True Copy:

Teste:

Kenneth J. Carrick

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX D.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

August 16, 1966

Before

HON. ELMER J. SCHNACKENBERG, *Circuit Judge*
HON. WIN G. KNOCH, *Circuit Judge*
HON. ROGER J. KILEY, *Circuit Judge*

UNITED STATES OF AMERICA,
Petitioner,

No. 15607 vs.

HONORABLE HUBERT L. WILL, Judge, United States District Court for the Northern District of Illinois,
Respondent.

Petition for Writ of Mandamus

ORDER

This cause came on to be heard upon the government's Petition For Reconsideration of the Order of July 12, 1966, and for a hearing on the merits, and upon the opposition of respondent to the granting of the petition; and the court being fully advised has reconsidered its order of July 12, 1966:

The court finds that in the circumstances of this particular case the court should consider the merits of the ruling of the district court challenged by the government, rather than to remit the government to a radical alternative appealable judgment available to the trial judge upon the government's persistent refusal to comply;

It is therefore ordered that the order of this court of July 12, 1966, be and it is hereby vacated, and the cause is taken by the court upon the petition for the writ, the briefs of both parties and the record.

APPENDIX E.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Tuesday, October 4, 1966

Before

HON. ELMER J. SCHNACKENBERG, *Circuit Judge*
HON. WIN G. KNOCH, *Circuit Judge*
HON. ROGER J. KILEY, *Circuit Judge*

UNITED STATES OF AMERICA,
Petitioner,
No. 15607 vs.
HONORABLE HUBERT L. WILL, etc.,
Respondent.

Petition for Stay

This cause came on to be heard upon the Government's petition for writ of mandamus ordering respondent to vacate his order directing the Government to answer question 25 in defendant's motion for bill of particulars, which question sought, among other things, the names and addresses of persons to whom defendant made oral statements supporting the indictment charging wilfull evasion of income tax, and which statements the Government would rely upon at the trial; upon the rule issued upon respondent to show cause why the writ should not issue; upon the brief of respondent answering the rule, and the brief of the Government; and upon the record.

And the Court having on August 16, 1966 vacated its July 12, 1966 order denying the writ, and having reconsidered the question,

It Is Ordered that a writ of mandamus issue as prayed in the Government's petition directing respondent to vacate his order directing the Government to answer question 25 in defendant's motion for bill of particulars.

A True Copy:

Teste:

Kenneth J. Carrick

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX F.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Monday, December 5, 1966

Before

HON. JOHN S. HASTINGS, *Chief Judge*
HON. ELMER J. SCHNACKENBERG, *Circuit Judge*
HON. WIN G. KNOCH, *Circuit Judge*
HON. LATHAM CASTLE, *Circuit Judge*
HON. ROGER J. KILEY, *Circuit Judge*
HON. LUTHER M. SWYGERT, *Circuit Judge*
HON. THOMAS E. FAIRCHILD, *Circuit Judge*
HON. WALTER J. CUMMINGS, JR., *Circuit Judge*

UNITED STATES OF AMERICA, *Petitioner,*		
No. 15607	vs.	Petition for Stay
HONORABLE HUBERT L. WILL, etc., *Respondent.*		

It Is Ordered by the Court that the petition for a rehearing *en banc* of this cause be, and the same is hereby DENIED.

(Cummings, C. J. voted to grant petition for rehearing *en banc*).

A True Copy:
Teste:
Kenneth J. Carrick
Clerk of the United States
Court of Appeals for the
Seventh Circuit.
By *H. K. McCormack*
Deputy Clerk

APPENDIX G.

CONSTITUTIONAL PROVISIONS, RULE AND STATUTES INVOLVED

The Fifth Amendment to the Constitution of the United States provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

§7206(1) Internal Revenue Code 1954 (26 U.S.C. 7206 (1)) provides:

> "Any person who willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter, shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000.00, or imprisoned not more than 3 years, or both, together with the costs of prosecution."

Section 1404, Title 18 United States Code provides:

> "In addition to any other right to appeal, the United States shall have the right to appeal from an order granting a motion for the return of seized property and to suppress evidence made before the trial of a person charged with a violation of

"(1) any provision of part I or part II of subchapter A of chapter 39 of the Internal Revenue Code of 1954 the penalty for which is provided in subsection (a) or (b) of section 7237 of such Code,

(2) subsection (c), (h), or (i) of Section 2 of the Narcotic Drugs Import and Export Act, as amended (21 U.S.C., sec. 174), or

(3) the Act of July 11, 1941, as amended (21 U.S.C., sec. 184a).

"This section shall not apply with respect to any such motion unless the United States attorney shall certify, to the judge granting such motion, that the appeal is not taken for purposes of delay. Any appeal under this section shall be taken within 30 days after the date the order was entered and shall be diligently prosecuted."

Section 3432, Title 18 United States Code provides:

"A person charged with treason or other capital offense shall at least three entire days before commencement of trial be furnished with a copy of the indictment and a list of the veniremen, and of the witnesses to be produced on the trial for proving the indictment, stating the place of abode of each venireman and witness."

Section 3731, Title 18 United States Code provides:

"An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:

"From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

"From a decision arresting a judgment of conviction for insufficiency of the indictment or information, where such decision is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

"From the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy.

"An appeal may be taken by and on behalf of the United States from the district courts to a court of appeals in all criminal cases, in the following instances:

"From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof except where a direct appeal to the Supreme Court of the United States is provided by this section.

"From a decision arresting a judgment of conviction except where a direct appeal to the Supreme Court of the United States is provided by this section.

"The appeal in all such cases shall be taken within thirty days after the decision or judgment has been rendered and shall be diligently prosecuted.

"Pending the prosecution and determination of the appeal in the foregoing instances, the defendant shall be admitted to bail on his own recognizance.

"If an appeal shall be taken, pursuant to this section, to the Supreme Court of the United States which, in the opinion of that Court should have been taken to a court of appeals, the Supreme Court shall remand the case to the court of appeals, which shall then have jurisdiction to hear and determine the same as if the appeal had been taken to that court in the first instance.

"If an appeal shall be taken pursuant to this section to any court of appeals, which, in the opinion of such court, should have been taken directly to the Supreme

Court of the United States, such court shall certify the case to the Supreme Court of the United States, which shall thereupon have jurisdiction to hear and determine the case to the same extent as if an appeal had been taken directly to that Court."

Section 1291, Title 28, United States Code provides:

"The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

Rule 7(f) Federal Rules of Criminal Procedure provides:

"The court for cause may direct the filing of a bill of particulars. A Motion for a bill of particulars may be made only within ten days after arraignment or at such other time before or after arraignment as may be prescribed by rule or order. A bill of particulars may be amended at any time subject to such conditions as justice requires."

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 918

HONORABLE HUBERT L. WILL, JUDGE, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The original order of the court of appeals denying the government's petition for a writ of mandamus (Pet. App. 5–6), its order granting the writ after reconsideration (Pet. App. 7–9), and petitioner's opinion refusing to vacate certain portions of his order directing the filing of a bill of particulars (A. 50–53),[1] are not reported.

[1] References to the government's Appendix in the court below are designated "A.", and references to petitioner's Supplemental Appendix, "S.A."

JURISDICTION

The order of the court of appeals, directing petitioner to vacate his order that the government furnish certain particulars in this criminal case, was entered on October 4, 1966 (Pet. App. 8–9), and a petition for a rehearing *en banc* was denied on December 5, 1966 (Pet. App. 10). The petition for a writ of certiorari was filed on December 29, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner's order, directing the government to turn over, by way of a bill of particulars, the names of certain informants who were prospective witnesses in a criminal case, constituted a clear abuse of discretion warranting the issuance of a writ of mandamus.

STATUTE AND RULES INVOLVED

Internal Revenue Code of 1954:

SEC. 7206. FRAUD AND FALSE STATEMENTS.

Any person who—

(1) DECLARATION UNDER PENALTIES OF PERJURY.—Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; * * *

* * * * *

shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution.
[26 U.S.C. 7206(1).]

Federal Rules of Criminal Procedure:[2]

RULE 7. THE INDICTMENT AND THE INFORMATION

* * * * *

(f) BILL OF PARTICULARS. The court for cause may direct the filing of a bill of particulars. A motion for a bill of particulars may be made only within ten days after arraignment or at such other time before or after arraignment as may be prescribed by rule or order. A bill of particulars may be amended at any time subject to such conditions as justice requires.

RULE 16. DISCOVERY AND INSPECTION

Upon motion of a defendant at any time after the filing of the indictment or information, the court may order the attorney for the government to permit the defendant to inspect and copy or photograph designated books, papers, documents or tangible objects, obtained from or belonging to the defendant or obtained from others by seizure or by process, upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable. The order shall specify the time, place and manner of making the inspection and of taking the copies or photo-

[2] As they appeared prior to the amendments effective on July 1, 1966. That was subsequent to the events in this case and the amended rules are accordingly inapplicable. Application of the new rules would not, we believe, lead to a different result. See p. 8, *infra*.

graphs and may prescribe such terms and conditions as are just.

RULE 17. SUBPOENA

* * * * *

(c) FOR PRODUCTION OF DOCUMENTARY EVIDENCE AND OF OBJECTS

A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

STATEMENT

In June 1965, Simmie S. Horwitz was indicted in the United States District Court for the Northern District of Illinois on charges of wilfully and knowingly subscribing corporate income tax returns which understated the corporation's gross sales by large amounts, in violation of 26 U.S.C. 7206(1) (A. 7–9). The defendant filed a motion for a bill of particulars asking that the government be required to answer 20 questions (A. 9–15). On November 29, 1965, petitioner granted the motion with some immaterial exceptions (A. 46; S.A. 1–5). The government then moved (A. 46; S.A. 6–7, 11–12) that the order be vacated with respect to certain questions, on the

ground that answers to these questions would involve naming all of the individuals who would testify for the prosecution, and thus afford an occasion for tampering with the witnesses (S.A. 2–3; A. 6–8, 10, 17; cf. A. 44–46).[3] Petitioner denied the motion (A. 47, 52). The government subsequently answered some of the questions, and another was withdrawn, leaving only question 25 in dispute. It reads (A. 13):

> 25. If the answer to Request No. 24[4] is in the affirmative, state with respect to each such statement, if there was more than one:
>
> (*a*) The name and address of the person to whom the statement was made;
>
> (*b*) The date on which the statement was made;
>
> (*c*) The place where it was made;
>
> (*d*) The substance of the statement;
>
> (*e*) Whether the persons to whom the statement was made was a Government Agent at the time of the statement;
>
> (*f*) The names and addresses of any other persons present at the time the statement was made; and
>
> (*g*) Whether a written memorandum or verbatim transcript of the oral statement was

[3] These questions called for the names of the payors of all unreported sales, insofar as determined by the government (A. 10, 11); for the names of all persons to whom petitioner had made oral statements upon which the government relied (A. 13); and for the name of any person upon whose statement the government relied (A. 14).

[4] Question 24, which the government answered affirmatively (A. 37), provides (A. 13):

> 24. Does the Government rely upon any oral statements of the Defendant to support the charge in the several counts of the Indictments.

made, and, if so, whether the Government has possession of the memorandum or transcript.

At a hearing on March 14 (S.A. 33–53), the government specifically asked petitioner to vacate his order directing that question 25 be answered (S.A. 34), and further narrowed the issue by agreeing to give the defendant all oral statements made to government agents (S.A. 36–37), thus limiting its objection to oral statements made by the defendant to third-party informants who were not participants in the alleged offense (S.A. 37, 39–40, 48–49). The government urged that there was always a danger that such witnesses would be tampered with if their identities were revealed (S.A. 39, 44; cf. S.A. 16). Petitioner, noting that the government had not shown such a danger in this case, declined to change his order that the government answer the question (S.A. 37–49; cf. S.A. 16–17).

The government obtained a stay of further proceedings from the court of appeals; a petition for a writ of mandamus was filed on March 21, 1966; and, on March 24, 1966, petitioner was directed to show cause why the writ should not issue (Pet. App. 2–4). On July 12, 1966, a panel of the court of appeals denied the writ (Pet. App. 5–6), but, on the government's motion for reconsideration, the panel on October 4, 1966, issued the writ, and on December 5, 1966, the court *en banc* denied petitioner's request for a rehearing (Pet. App. 7–10).

ARGUMENT

1. A court of appeals has, of course, jurisdiction to issue a writ of mandamus when a district court has

clearly misinterpreted its authority under the federal rules of procedure (*Schlagenhauf* v. *Holder*, 379 U.S. 104, 110, 111; see, also, *Miner* v. *Atlass*, 363 U.S. 641; *LaBuy* v. *Howes Leather Co.*, 352 U.S. 249, 257; *Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379, 382–383[4]), including the criminal rules (*In re United States*, 348 F. 2d 624 (C.A. 1); cf. *Petition of United States*, 306 F. 2d 737 (C.A. 9); *United States* v. *Igoe*, 331 F. 2d 766 (C.A. 7), certiorari denied, 380 U.S. 942).

2. The purpose of a bill of particulars is to protect the defendant against a second prosecution for the same offense and to enable him to prepare his defense without fear of unfair surprise (*Norris* v. *United States*, 152 F. 2d 808, 811 (C.A. 5), certiorari denied, 328 U.S. 850)—not to compel disclosure of the government's evidence prior to trial (*United States* v. *Kushner*, 135 F. 2d 668, 673 (C.A. 2), certiorari denied, 320 U.S. 212; *United States* v. *Lebron*, 222 F. 2d 531, 535–536 (C.A. 2), certiorari denied, 350 U.S. 876; *Downing* v. *United States*, 348 F. 2d 594, 599 (C.A. 5), certiorari denied, 382 U.S. 901). Thus, the courts have rarely required the government to give the names of its witnesses. *United States* v. *Eddington*, 328 F. 2d 760, 761 (C.A. 7), certiorari denied, 379 U.S. 818; *United States* v. *Lebron*, *supra*.

Petitioner has adopted a contrary approach. He acknowledges that—in all criminal cases—he requires the government to disclose to the defense the identity of persons who were alleged to have been present when the offense was committed (S.A. 8–15). In the

[4] *United States* v. *Bondy*, 171 F. 2d 642 (C.A. 2), upon which petitioner relies (Pet. 12, 17), was decided prior to the cited decisions of this Court.

present case he went even further and directed the government to reveal the identity of persons who were present when the defendant made oral statements, whether as part of the actual crime or not, and whether incriminatory or non-incriminatory (S.A. 35, 44). And instead of requiring the defense to show cause why the names of the witnesses were necessary, as provided by Rule 7(f) at that time (*supra*, p. 3), he required the government to show cause why the names should not be disclosed (S.A. 3–4, 15–17, 39, 45).

The approach of petitioner—which in effect permits discovery to the same extent as in civil proceedings—is manifestly contrary to the Criminal Rules, and a proper subject of correction by writ of mandamus. It is significant to note that such an approach was strenuously urged upon this Court prior to the adoption of the recent amendments. See, *e.g.*, Symposium, *Discovery in Federal Criminal Cases*, 33 F.R.D. 47, 63, 92, 96. But it was rejected (save that the requirement that the defense show cause was eliminated from Rule 7(f)).

3. Petitioner's approach is also inconsistent with the teachings of this Court in *Roviaro* v. *United States*, 353 U.S. 53, and *Rugendorf* v. *United States*, 376 U.S. 528. The names sought by question 25 were, as in *Roviaro* and *Rugendorf*, the names of informants. *Roviaro* holds that the informant's privilege is important for "the furtherance and protection of the public interest in effective law enforcement" (353 U.S. at 59). In that case, it was clear from the outset that the informant was the sole participant, other

than the accused, in the transaction which gave rise to the alleged offense, and that he was the "only witness in a position to amplify or contradict the testimony of government witnesses" who had observed the offense from some distance.[6] *Id.* at 64. This Court held that, "under these circumstances", prejudicial error had been committed in refusing to disclose the informant's identity. *Id.* at 65. The circumstances here are far different. In *Roviaro,* the informant was, as noted, the only other participant in the criminal offense aside from the defendant himself; here, the informants, for all that at present appears, have done no more than hear the defendant make oral statements relative to the charged offense. In *Roviaro,* the informant was not called to the stand by the government; here, the government has assured petitioner (S.A. 37) that the informants will take the stand.

Since the defendant will ultimately have an opportunity to hear the testimony of the informants, his interest in immediate disclosure of their testimony is no more than an interest in enjoying the advantage of pretrial discovery—an advantage traditionally denied criminal defendants (S.A. 42–43). We submit that the "public interest in protecting the flow of information" (*Roviaro* v. *United States, supra,* 353 U.S. at 62) plainly entitles the government to shield its informants from harassment prior to trial. Here, as in *Rugendorf* v. *United States, supra,* 376 U.S. at

[6] The Court pointed out that Roviaro's request for a bill of particulars should have been granted because it was obvious from the indictment that the informant was a material witness. 353 U.S. at 65, n. 15.

535, the defendant "failed to develop the criteria of *Roviaro* necessitating disclosure * * *."

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

HONORABLE HUBERT L. WILL, Judge, United States District Court for the Northern District of Illinois,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

BRIEF FOR THE PETITIONER

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IN THE

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No. 36

HONORABLE HUBERT L. WILL, Judge, United States District Court for the Northern District of Illinois,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

BRIEF FOR THE PETITIONER

OPINION BELOW

The order of the United States Court of Appeals for the Seventh Circuit was entered on October 4, 1966 and has not been reported. The opinion of Petitioner has not been reported.

JURISDICTION

The order of the United States Court of Appeals for the Seventh Circuit was entered on October 4, 1966, and a timely petition for rehearing *en banc* was denied on December 5, 1966. The jurisdiction of this Court rests on 28 U.S.C. 1254(1), 62 Stat. 928.

QUESTIONS PRESENTED

1. Does a Court of Appeals have jurisdiction to issue a writ of mandamus to prohibit a District Court from directing the Government to furnish a request for a bill of particulars where there is no statutory authority for an appeal by the Government from such order, and where the District Court has lawfully exercised its prescribed jurisdiction?

2. Can a Court of Appeals substitute its discretion for that of a District Court by the issuance of a writ of mandamus preventing the District Court from requiring the Government to furnish a bill of particulars which may disclose, in part, the names of some prospective witnesses?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Because of the number and length of the constitutional provisions and statutes involved, they are set forth in the Appendix, pp. App. 1-5, *infra*.

STATEMENT

Petitioner is a Judge of the United States District Court for the Northern District of Illinois. Pending before him

are two indictments brought by the United States against one Simmie S. Horwitz for making and subscribing false corporate income tax returns, in violation of Section 7206(1), Internal Revenue Code, 1954 (26 USC §7206(1)) (R. 13, 14). The defendant entered a plea of not guilty to each of the indictments and was given leave to file pretrial motions (R. 8).

Among those motions filed was a motion for a Bill of Particulars, (R. 15) which the Government opposed (R. 9). On November 29, 1965, petitioner granted all of the requests for particulars with the exception of Requests 4 and 29(b) (R. 10, 63-64).

On December 3, 1965, respondent filed a motion to vacate that portion of petitioner's order of November 29, 1965, directing respondent to answer Requests 14, 25, 28 and 29(a) of the defendant's Bill of Particulars. Respondent claimed that the furnishing of such particulars would constitute the disclosure, in a criminal case, of a list of the Government's witnesses (R. 68). Respondent then orally amended its motion to include a refusal to answer Request 7 (R. 72-73).

The indictments had charged the making and subscription of false corporate returns wherein the gross sales of the company were misstated (R. 13, 14). The defendant's four questioned requests related in pertinent part, respectively, to the names and addresses of persons from whom unreported gross sales were received; the names and addresses of payers of unreported sales if the specific item of proof was used; the names and addresses of persons present and to whom oral statements were made by the

defendant to support the charges of the indictment;[1] and, finally, the names and addresses of persons other than the defendant whose oral statements were relied upon to support the charges of the indictment.

Petitioner took respondent's motion to vacate under advisement and on December 7, 1965, filed his memorandum opinion affirming his prior order and directing compliance therewith, including request 25 (R. 54, 58-60). However, the order to answer subparagraph (d) of request 25, disclosing the substance of defendant's oral statements, was vacated (R. 54). Petitioner also restricted the language of the request seeking information "on which the government relies" to mean information "as that which the gov-

---

[1] Request No. 25 relates to the issue on review and it, together with request No. 24 upon which it is predicated is set out as follows:

"24. Does the Government rely upon any oral statements of the defendant to support the charge in the several counts of the indictments?"

"25. If the answer to Request No. 24 is in the affirmative, state with respect to each such statement, if there was more than one:

(a) the name and address of the person to whom the statement was made;

(b) the date on which the statement was made;

(c) the place where it was made;

(d) the substance of the statement;

(e) whether the person to whom the statement was made was a Government agent at the time of the statement;

(f) the names and addresses of any other person present at the time the statement was made; and

(g) whether a written memorandum or verbatim transcript of the oral statement was made, and if so, whether the Government has possession of the memorandum or transcript."

ernment deems relevant and material," rather than "all such information in the government's possession" (R. 60).

On January 4, 1966, the matter was called to set for trial. Defendant filed a motion for the entry of an order directing the Government to furnish the particulars which it had to that date refused to supply,[2] or in the alternative, to dismiss the indictments (R. 106-108). At this hearing, respondent filed in open court its amended Bill of Particulars (R. 34-35, 78) in which it answered Requests 7 (R. 35-42), 24 (R. 44) and 28 (R. 44) but persisted in refusing to answer Request 14 (R. 43), 25 (R. 44) and 29(a) (R. 45).

By its answers to Requests 24 and 28 it acknowledged that it intended to rely both upon oral statements of the defendant as well as other persons to support the charges of the indictments. Though the respondent had previously taken the position that an answer to Request 7 would require giving the names and addresses of witnesses (R. 72-73), its answer disclosed "the government does not know the name and addresses of those persons from whom the . . . understated gross receipts were received" (R. 42).

At this hearing, petitioner indicated that he would continue the trial indefinitely until such time as the government answered the remaining requests (R. 80). The same day however, the defendant filed a second motion to dismiss the indictments asserting that the court had the right to dismiss them, and that the decision of the Court to postpone trial pending disclosure by the Government, in the face of the refusal of the Government to furnish the particulars, constituted a violation of the Sixth Amend-

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[2] Respondent had previously, on December 10, 1966, refused to answer requests 7, 14, 24, 25, 28 and 29(a) (R. 24, 28, 32, 33-34).

ment by denying the right to a speedy trial (R. 108-110). The court entered and continued the motion giving the Government sixty days within which to answer or possibly suffer dismissal (R. 82).

At the expiration of the sixty days, the motion to dismiss the indictments was called for consideration. Respondent took the position that it would not furnish the information with respect to Question 14 (R. 83), Request 25 (R. 84), and Request 29a (R. 85-86). Upon oral argument, petitioner reconsidered Request 29(a),[3] and viewing it as a request for statements which are in the nature of statements producible under 18 USC §3500, reversed his former position and refused to order the Government to produce the statements pursuant to that request (R. 87). The government requested a week to reconsider its position (R. 89). Petitioner indicated that if the government would be then unwilling to give the information requested, he would dismiss the indictment (R. 89).

One week later, the government filed its answer to Request 14 of the defendant's bill of particulars (R. 90, 45-52), but again refused to answer the remaining request No. 25. In the colloquy between Court and counsel, the information sought by request 25 was further circumscribed to those statements which "were material to the

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[3] Request 29(a) stated as follows:

"If the answer to Request No. 28 is in the affirmative [Does the Government rely upon the statement of any person, other than the defendant, to support the charge in the several counts of the indictments], state with respect to each person, if there is more than one:

(a) name and address of each such person or persons;" (R. 21)

proceedings'' (R. 92). The Government conceded its position sufficiently to agree to furnish statements in the form of admissions made to government agents (R. 92).[4] But, in spite of petitioner's specific findings that the same was not a direction to furnish a list of witnesses (R. 94, 95, 97), the government persisted in refusing to give the answers to request 25 which related to statements made to non-government agents (R. 93).

Petitioner delayed the entry of his proposed order (R. 106) and in the interim, the government filed in the United States Court of Appeals for the Seventh Circuit its Emergency Petition For Stay Order Pending Filing of Petition for Mandamus which was granted together with leave to file a petition for writ of mandamus (R. 1). A Rule to Show Cause was thereupon issued against petitioner (R. 61) and after taking the matter upon briefs without oral argument, the Court of Appeals denied the Petition for writ of mandamus, holding:

> ''The Court finds that the order subject to the petition is not an appealable order, and a review of it would offend the policy against piecemeal appeals in criminal cases, *Cobbledick* v. *United States,* 309 U.S. 323; that mandamus may not be used as a means of reviewing the non-appealable order, *Roche* v. *Evaporated Milk Association,* 319 U.S. 21; that federal courts use mandamus for the traditional purpose of confining a district court to a lawful exercise of its jurisdiction or to compel it to exercise its proper jurisdiction, *Roche* v. *Evaporated Milk Association;* that the district judge's order upon the government to furnish names

[4] To date, this information has not been furnished the defendant (R. 13).

and addresses of witnesses to a defendant may be erroneous, a question we do not decide, but the ruling itself was within the court's jurisdiction, *Roche* v. *Evaporated Milk Association;* that the ruling can be reviewed on appeal from a final judgment; and that there is no question here that the district judge refused to exercise his proper jurisdiction.

"It Is Therefore Ordered that the petition for writ of mandamus be and it is hereby denied." (R. 110)

Thereafter, upon the Government's Petition for Reconsideration of that order, the Court of Appeals reversed itself and undertook to consider the petition.

"The Court finds that in the circumstances of this particular case the court should consider the merits of the ruling of the district court challenged by the government, rather than to remit the government to a radical alternative appealable judgment available to the trial judge upon the government's persistent refusal to comply;

"It is therefore ordered that the order of this court of July 12, 1966, be and it is hereby vacated, and the cause is taken by the court upon the petition for the writ, the briefs of both parties and the record." (R. 112)

Upon reconsideration, and without opinion, it finally ordered that a writ of mandamus issue directing your petitioner to vacate his order directing the government to answer question 25 in defendant's motion for bill of particulars (R. 113).

Thus, petitioner's order, the validity of which is to be considered by this court, relates to the direction to furnish the defendant the names and addresses of non government persons to whom the defendant made statements

material to the proceedings, the date on which the statements were made, the place where they were made, the names and addresses of any other persons present at the times the statements were made, and whether written memoranda or verbatim transcripts of the oral statement were made, and if so, whether the Government has possession of the memoranda or transcripts.

SUMMARY OF ARGUMENT.

I. There persists in our judicial system an antipathy to Governmental right of review in criminal cases, and appeal by the Government is unusual and not favored. *Carroll* v. *United States,* 354 U.S. 394. Piecemeal appeals are generally not permitted and those statutory exceptions to intermediate appeal are addressed either in terms or by necessary operation solely to civil actions. *Di Bella* v. *United States,* 369 U.S. 121.

Congress has shown its propensity to severely limit governmental right of review. This is apparent from the restrictive appellate rights contained in the Criminal Appeals Act, 18 USC §3731, and from its unwillingness, except in unique situations, to enact legislation permitting governmental appeals in criminal cases from orders which do not terminate the prosecution; *c.f.,* 18 USC §1404. Such statutory rights are to be strictly construed and limited to the expressed statutory situations. *United States* v. *Sanges,* 144 U.S. 310; *Di Bella* v. *United States,* 369 U.S. 121. In addition, the general grant of appellate jurisdiction given by Congress to the Courts of Appeal by 28 USC §1291 has never afforded appellate review to the Government in a criminal case. *Carroll* v. *United States,* 354 U.S. 394, 403; *c.f., Stack* v. *Boyle,* 342 U.S. 1.

Mandamus likewise should not and cannot lie in light of the traditional abhorrence to the right of governmental review in criminal cases, especially where the only effect of the writ would be to avoid congressional policy against piecemeal appeals in criminal cases. See *Roche* v. *Evaporated Milk Ass'n.*, 319 U.S. 21. There is no strong and compelling reason for this Court to engraft judicial exception in an area which Congress itself has the power to eliminate, but to date has not. To permit the use of mandamus would be to open the floodgates to review of pretrial orders in criminal cases. See, *Switzerland Cheese Association* v. *Horne's Market*, 385 U.S. 23.

The extraordinary writ has never been approved or used by this court to control a procedural order in a criminal case, within the District Court's jurisdiction, which did not deprive the prosecution of its right to trial permitted by law, or to the results of a proper conviction.

The Court of Appeals may, pursuant to the All Writs Act, 28 USC §1651(a) issue all writs necessary or appropriate in aid of its jurisdiction. In "aid of jurisdiction" has been interpreted to mean in aid of appellate jurisdiction, *Roche* v. *Evaporated Milk Assn.*, 319 U.S. 21, and that standard is applicable as well, to government applications for the writ. The authority to issue the writ has been sparingly used to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so. *Roche* v. *Evaporated Milk Ass'n.*, 319 U.S. 21, 26. In those cases in which this Court has considered or authorized the writ to control an order in a criminal case, the order either deprived the prosecution of its right to a trial permitted by law or to the results of a proper conviction. *Ex parte United States*, 287 U.S. 241, *Ex parte*

United States, 242 U.S. 27, *United States* v. *Mayer,* 235 U.S. 55, *United States* v. *Smith,* 331 U.S. 469.

Only two cases in the courts below have considered whether the Government may, in a criminal case, resort to the extraordinary relief of mandamus to vacate a pretrial order entered after proper indictment had been returned. The Second Circuit in *United States* v. *Bondy,* 171 F.2d 642 (2d Cir. 1948), held that mandamus was not available to the government to vacate an order granting a bill of particulars. In *In re United States,* 348 F.2d 624 (1st Cir. 1965) the First Circuit granted mandamus on petition of the Government to vacate an order of the District Court providing for the taking of a deposition by a defendant under Rule 15(a) Fed. R. Crim. P. In *Bondy* the court refused mandamus on the theory that the government could not appeal and in light of the legislative purpose to avoid piecemeal reviews, holding, the writ could not therefore be in aid of its appellate jurisdiction and would not issue. In *In re United States,* the court issued the writ on the theory that a persistent refusal by the Government would result either in dismissal of the indictment or contempt, either one of which could be reviewed on appeal. Therefore, the writ was in aid of its appellate jurisdiction.

To accept the reasoning of the First Circuit would make virtually every order unfavorable to the Government in a criminal case subject to review by the extraordinary writ contrary to the ordered judicial process in criminal cases. See *Cobbledick* v. *United States,* 309 U.S. 323, *Roche* v. *Evaporated Milk Ass'n.,* 319 U.S. 21, 30. The writ should not issue in any case where its issuance is neither in the exercise of appellate jurisdiction nor in aid of that jurisdiction. *Marbury* v. *Madison,* 1 Cranch (U.S.) 37, 185.

Since legislation may be held to imply restriction on the use of mandamus, though not specifically stated, *United States* v. *Rice*, 327 U.S. 742, 749, Congress may effectively withdraw the right of mandamus to reviewing courts. Consequently, the power to issue does not exist on some overall theory of always present superintending power to control the administration of the courts. C.f., *United States* v. *United States District Court*, 238 F.2d 713 (4th Cir., 1956). Though mandamus is not specifically prohibited by the Criminal Appeals Act, nevertheless Congressional reclutance to give review to the Government in a criminal case, as evidenced by that Act, permits the conclusion that mandamus is precluded by statutory implication from use therein by the Government.

A balancing of the inherent protections historically afforded defendants in criminal proceedings against the rights of the soverign to proceed with its duty to prosecute and to retain the results of prosecution prohibits application of mandamus to the Government in a criminal case to review an interlocutory order of the District Court which does not deny the Government the right to proceed to prosecution or take from it the results of a conviction. The balancing of these factors is weighted by the Sixth Amendment right to speedy trial which unfettered governmental interlocutory review by mandamus could adversely affect. Similarly, the concepts underlying the Fifth Amendment prohibition against double jeopardy, that the resources and power of the sovereign should not be allowed to make repeated attempts to convict an individual for an alleged offense, are equally prohibitory to prevent persistent review by the Government of interlocutory orders which could materially and mentally debilitate the defendant in the preparation of his defense.

II. However, if the mandamus power exists irrespective of the dichotomy between civil and criminal cases, the standards of either specie of case are applicable to determine the proper issuance of the writ. The traditional use of the writ has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority to do so. *Roche* v. *Evaporated Milk Ass'n.*, 319 U.S. 21, 26.

Petitioner had discretion to grant or deny a bill of particulars and therefore some action on his part was within his jurisdiction to act, Rule 7(f), Fed. R. Crim. P., *Wong Tai* v. *United States*, 273 U.S. 77. Since the All Writs Act is meant to be used only in the exceptional case where there is a clear abuse of discretion, mandamus may be used only to require the inferior court to decide a matter within its jurisdiction, not to control the decision, *Ex parte Loring*, 94 U.S. 418, *Ex parte Morgan*, 114 U.S. 174; and may not be a device for the reviewing court to substitute its discretion for that of the lower court. *Re Winn*, 213 U.S. 458.

"Clear abuse" of judicial discretion permitting the issuance of a writ of mandamus is confined to a situation and circumstances which clearly show arbitrary action not justifiable in view of such situation and circumstances, *Hartford-Empire Co.* v. *Obear-Nester Glass Co.*, 95 F.2d 414 (9th Cir. 1938). See, *Burns* v. *United States*, 287 U.S. 216. The action of the district court cannot be set aside by the reviewing court unless it has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors. *In re Josephson*, 218 F.2d 174 (1st Cir. 1954). The Government is obliged to show the foregoing and that its right to the mandamus was "clear and indisputable" *United States* v. *Duell*, 172 U.S. 576.

The purpose of the bill is to furnish the defendant information respecting the charge when necessary to the preparation of his defense and to avoid prejudicial surprise at the trial, *United States* v. *Glaze,* 313 F.2d 757 (2d Cir. 1963), and when necessary for those purposes he is entitled to the same "as of right", *United States* v. *United States Gypsum,* 37 F.Supp. 398 (P.D.C. 1941). In light of the rights of the defendant thereto, petitioner's order was not a "clear abuse of his discretion" warranting the issuance of the writ.

The most that can be urged is that the ordered request for particulars contains the names of some possible witnesses, but not a "list of witnesses' which is an enumeration of all witnesses who will testify at the trial. *Bird* v. *United States,* 187 U.S. 118; *Logan* v. *United States,* 144 U.S. 263. The reason for requiring disclosure of some of these names is that it is not that they will or may be witnesses but that the defendant requires identification of the times, places and persons present in order to prepare his defense. Petitioner's order requires no disclosure of evidence, any legal theory, nor even the substance of the statements made by the defendant.

In many cases, the names of actual or potential witnesses have either been disclosed by bill of particulars or such disclosure has been discussed with approval. *Kirby* v. *United States,* 174 U.S. 47; *United States* v. *Debrow,* 346 U.S. 374. In addition many courts have commented that the *disclosure* of the names of witnesses is discretionary. *Barnes* v. *United States,* 347 F.2d 925 (8th Cir. 1965); *United States* v. *Frank,* 23 F.R.D. 145 (D.D.C. 1959); *United States* v. *Solomon,* 26 F.R.D. 397 (S.D.Ill. 1960).

No prejudice exists to the Government by such disclosure since no showing was made that any harm would befall the persons whose names would be disclosed, c.f. *Gordon* v. *United States,* 344 U.S. 414.

The order entered by the court to furnish to the defendant the requested bill disclosed no more and furnished the defendant no extraordinary information than many other courts have from time to time ordered furnished. Under no circumstances could the court below have concluded that petitioner's order was the "clear error of judgment in the conclusion reached upon a weighing of the relevant factors", *In re Josephson,* 218 F.2d 174 (1st Cir. 1954) which must be found before mandamus could issue to direct a vacation of his order.

ARGUMENT

I.

THE COURT OF APPEALS EXCEEDED ITS POWER IN ISSUING A WRIT OF MANDAMUS TO PROHIBIT THE DISTRICT COURT FROM DIRECTING THE GOVERNMENT TO FURNISH A REQUEST FOR A BILL OF PARTICULARS.

A. The Historical, Constitutional, Congressional, And Judicial Antipathy To Governmental Right Of Review In Criminal Cases Militates Against The Use Of Mandamus By The Government To Review Interlocutory Orders In Criminal Prosecutions.

In apparent dissatisfaction with petitioner's attitude of "being unduly helpful to defendants by having the Government identify people who were supposed to have been there when the crime took place" (R. 70), the Government adamantly persisted in its refusal to comply with petitioner's order to furnish the defendant with a bill of particulars (R. 65, 78, 83, 90). Having in mind not merely the effect of the ruling in the instant proceeding (R. 76), respondent clearly intended to achieve review of this order by the court below (R. 100) in anticipation of " . . . obtaining . . . a definitive statement of the applicable legal principle . . . " (R. 6).[5]

[5]Although petitioner does not seek to reach the issue of whether respondent was requesting an advisory opinion, it is well settled that the federal courts do not render such opinions. *United Public Workers of America (C.I.O.), et al.* v. *Mitchell*, 330 U.S. 75, 89.

It is not now disputable that as a condition of review, finality is a characteristic of federal procedure. *Cobbledick* v. *United States,* 309 U.S. 323, 324. The principle that review awaits final judgment was derived from the common law and enacted by the First Congress, First Judiciary Act §§21, 22, 25, 1 Stat. 73, 83, 84, 85 (1789); *DiBella* v. *United States,* 369 U.S. 121, 124. It is also historically clear that the existence of appellate jurisdiction in a specific federal court over a given type of case depends upon authority expressly conferred by statute. *Carroll* v. *United States,* 354 U.S. 394, 399.

The concept of review only after final judgment remains dominant, 6 Moore, Federal Practice (2d Ed. 1953) 113, despite Congressional enactments in specific proceedings where disruption by intermediate appeal is outweighed by the possible damage of error if unreviewed before the judgment is definitive and complete,[6] and despite allowance of immediate appeal by this Court from orders collateral to the principal litigation touching matters that will not "affect, or . . . be affected by decisions of the merits of [the] . . . case." *Cohen* v. *Beneficial Industrial Loan Corp.,* 337 U.S. 541, 546.

But, criminal cases stand on a different footing:

> "Every statutory exception is addressed either in terms or by necessary operation solely to civil actions. Moreover, the delays and disruptions attendant upon intermediate appeal are especially inimical to the effective and fair administration of the criminal law." *DiBella* v. *United States,* 369 U.S. 121, 126.

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[6] See 30 Stat. 544, 553 (1898), as amended, 11 USC §47 (bankruptcy proceedings); 28 USC §1252, (orders invalidating federal statutes); 28 USC §1253, (injunctions issued or refused by statutory three-judge courts); 28 USC §1292(a)(1)-(4) (injunctions, receivership, admiralty, patent infringement); 28 USC §1292(b), 72 Stat. 1770, (discretionary certification of controlling questions of law in civil cases).

It is not unusual that a different perspective should persist as to appellate review in criminal cases and that appeal by the Government is " . . . something unusual, exceptional, not favored." *Carroll* v. *United States*, 354 U.S. 394, 400. "To be effective, judicial administration must not be leaden-footed. Its momentum would be arrested by permitting separate reviews of the component elements in a unified cause. These considerations of policy are especially compelling in the administration of criminal justice." *Cobbledick* v. *United States*, 309 U.S. 323, 325.

In order to meet the problem raised by the termination of prosecution based upon construction of the constitutional validity of a federal statute, Congress adopted the Criminal Appeals Act of 1907, 34 Stat. 1246, the forerunner of the present 18 USC §3731, 63 Stat. 97, amended, 63 Stat. 97,[7] allowing appeals by the Government in limited specific situations terminating the prosecution. Although Congress can enact legislation[8] to permit appeals by the Government in criminal cases from orders which do *not* terminate the prosecution,[9] all such statutory rights are construed strictly

[7] "The legislative history emphasizes the awareness of the Congress that Government appeals in criminal cases were a sharp innovation and Congressional concern that such jurisdiction should go no farther at that time than the immediate problem of affording review for trial court opinions as to the construction or validity of federal statutes." *Carroll* v. *United* States, 354 U.S. 394, 402 Note 11.

[8] Article III, Section 2, of the Constitution of the United States.

[9] *E.g.*, Narcotic Control Act of 1956, §201, 70 Stat. 567, 573, 18 USC §1404 allowing appeal from orders granting pretrial motions to suppress the use of seized narcotics as evidence. See also, District of Columbia Code, 1951, Ed. §23-105, 48 Stat 831, governing appeals by the United States or the District of Columbia in criminal cases arising in the District of Columbia.

and limited to those expressed statutory situations. *United States* v. *Sanges*, 144 U.S. 310, 312; *DiBella* v. *United States*, 369 U.S. 121, 130. Of course, the superintending limitation of the Fifth Amendment prohibition against double jeopardy restricts all such statutes. C.f., *Fong Foo* v. *United States*, 369 U.S. 141.

Furthermore, the Government cannot disregard the Criminal Appeals Act and seek review of interlocutory orders in criminal cases[10] through the application of the general grant of appellate jurisdiction to the Courts of Appeal by 28 USC §1291 on the theory that orders of that sort, and of the kind herein involved, possess sufficient independence from the main course of the prosecution to warrant treatment as plenary orders which may be appealable under the theory of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541. The application of the reasoning of that decision to criminal cases has been extremely limited, *Carroll* v. *United States*, 354 U.S. 394, 403, see, *Stack* v. *Boyle*, 342 U.S. 1, and never been applied to permit appellate review to the Government. "Nor are the considerations against appealability made less compelling . . . by the fact that the government has no later right to appeal . . . " *DiBella* v. *United States*, 369 U.S. 121, 130. Thus, as a general proposition, the right of governmental appellate review in criminal cases is inimical to historical, constitutional, congressional and judicial precedents.

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[10] Interlocutory, as here applied, is essentially equivalent to those orders which do not result in a termination of the prosecution. *C.f.*, *Berman* v. *United States*, 302 U.S. 212, 213; *Parr* v. *United States*, 351 U.S. 513.

With a tacit acknowledgement of the foregoing principles, respondent filed its petition for writ of mandamus with the court below, claiming, "The Government has no remedy other than by mandamus" (R. 6). Mandamus, however, should not and cannot lie here in light of the traditional abhorrence to the right of governmental review in criminal cases, the strict application of such right to limited statutes, and the traditional reluctance to the use of mandamus where statutes establish the conditions of appellate review and the only effect of the writ would be to avoid those conditions and thwart the Congressional policy against piecemeal appeals in criminal cases. *Roche* v. *Evaporated Milk Ass'n*, 319 U.S. 21, 30.

There is no strong and compelling reason for this Court to create a judicial erosion of a bulwark which the Congress itself has the power to eliminate, but to date has not. If it is desirable that the Government be entitled to review from orders of the kind now before the Court, Congress can meet the need:

> "* * * It is the function of the Congress to decide whether to initiate a departure from the historical pattern of restricted appellate jurisdiction in criminal cases." *Carroll* v. *United States*, 354 U.S. 394, 407.

To permit the use of mandamus to review the grant of a bill of particulars in a criminal case is to "open the floodgates" to review by mandamus of many pretrial orders. See, *Switzerland Cheese Asso.* v. *Horne's Market*, 385 U.S. 23, 24.

B. The extraordinary Writ Has Never Been Approved Or Used By This Court To Control A Procedural Order In A Criminal Case, Within The District Court's Jurisdiction, Which Did Not Deprive The Prosecution Of Its Right To Trial Permitted By Law, Or To The Results Of A Proper Conviction.

While the obvious dichotomy between civil and criminal cases has been sharply drawn by this Court in analyzing the right of the Government to appeal in a criminal case, *United States* v. *More* (U.S.) 3 Cranch 159; *United States* v. *Sanges,* 144 U.S. 310; *Re Heath,* 144 U.S. 92; *Cross* v. *United States,* 145 U.S. 571; *Cobbledick* v. *United States,* 309 U.S. 323; *Carroll* v. *United States,* 354 U.S. 394; *DiBella* v. *United States,* 369 U.S. 121, nevertheless, no sharply defined criteria have been similarly drawn along this distinction as to the availability to the Government in a criminal case of the extraordinary writ of mandamus.

It is conceded that the court below may, pursuant to the "All Writs Act", 28 U.S.C. §1651(a), 62 Stat. 944, as amended, 63 Stat. 102:

> " . . . issue all writs necessary or appropriate in aid of [its] jurisdiction and agreeable to the usages and principles of law."

But to what extent is the authority to do so when the writ is sought by the Government in a criminal case?

The leading authority in mandamus in a criminal case is this court's decision in *Roche* v. *Evaporated Milk Ass'n,* 319 U.S. 21, where the writ was sought by the *defendants.* There, no question was raised as to the power of the court in such circumstances to grant the writ, but instead the issue was "whether in the light of all the circumstances the case was an appropriate one for the exercise of that

power." 319 U.S. at 26. Noting jurisdiction of the Court of Appeals to be exclusively appellate, this Court held authority to issue the writ was in *aid of that jurisdiction* without regard to whether an appeal had been perfected, since "otherwise the appellate jurisdiction could be defeated and this purpose of the statute authorizing the writ thwarted by unauthorized action of the District Court obstructing the appeal." 319 U.S. at 25. By so stating, the court noted the inherent premise that the defendant who was seeking the writ might at some time have the right to appeal. The principles which were enumerated as guides to the exercise of discretion by appellate courts on the use of the extraordinary remedy were directed to those instances in aid of their appellate jurisdiction.

"In aid of appellate jurisdiction" is a standard equally applicable to governmental applications for the writ. Though its right to avail itself of such appellate review is greatly circumscribed, 18 USC 3731, c.f., 18 USC 1404, this Court has approved, though sparingly, the issuance of the extraordinary remedy upon application by the Government in criminal cases without extensive comment thereon; but see, *Ex parte United States*, 287 U.S. 241, 246. While, as stated in *DiBella* v. *United States*, 369 U.S. 121, 125, N. 4:

> " . . . the authority [to issue the writ] has been most sparingly exercised, when no other remedy will suffice, 'to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.' *Roche* v. *Evaporated Milk Ass'n*, 319 U.S. 21, 26, 87 L.Ed. 1185, 1190, 63 S. Ct. 938",

the authority is even more sparingly exercised in a criminal proceeding, and still less frequently exercised when applied for by the government. Until this case, this court has

never approved, nor even considered exercising that authority to control an order in a criminal case which was merely procedural, within the court's jurisdiction,[11] and which did not deprive the prosecution of its right to a trial permitted by law or to the results of a proper conviction.[12]

Those cases in which the issuance of an extraordinary writ sought by the Government in a criminal case has been approved by this Court, are *Ex parte United States*, 287 U.S. 241, *Ex parte United States*, 242 U.S. 27, *United States* v. *Mayer*, 235 U.S. 55, and *United States* v. *Smith*, 331 U.S. 469.

In *Ex parte United States*, 287 U.S. 241, following indictment, the District Court refused to issue a bench warrant. Concluding that the ruling constituted a refusal to permit the enforcement of the law, this Court stated it "is equivalent to a denial of the absolute right of the government, as matters stand, to put the accused on trial, since that cannot be done in his absence." (287 U.S. at 249)

An earlier decision bearing the same title, *Ex parte United States*, 242 U.S. 27 considered the action of a dis-

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[11] That petitioner had the jurisdiction to grant a bill of particulars can hardly be disputed. Rule 7(f), F.R.Cr.P. The most that can be said is that the order was so sweeping as to amount to an abuse of discretion. *United States* v. *Bondy*, 171 F.2d 642 (2d Cir., 1948). Whether, petitioner's order was an abuse of discretion, *and if so*, whether such abuse constitutes a divestiture of jurisdiction once obtained is discussed below, pp. 33-34.

[12] A similar issue is now pending in the 5th Circuit. *United States* v. *Cabot, Judge of the United States District Court for the So. Dist. of Fla.*, No. 24147.

trict court suspending execution of sentence upon a plea of guilty to a charge of bank embezzelment where the statute required a mandatory minimum term of imprisonment. While the appropriateness of the writ was challenged, the contention was disposed of by "a mere reference" to five earlier decisions of the court, and relating to civil matters.[13] This court concluded that mandamus should issue since the District Court had no power under the statute to suspend the sentence.[14]

Both *United States* v. *Mayer,* 235 U.S. 55 and *United States* v. *Smith,* 331 U.S. 469 involve the action of the District Court in granting new trials where the courts had already lost jurisdiction to so act. In *Mayer,* the court vacated the judgment of conviction after its term of court had ended and the case was awaiting argument in the appellate court. In *Smith,* conviction had been affirmed on appeal, mandate had issued, and the defendant imprisoned when the district court attempted to grant a new trial.

None of the foregoing involve a pre-trial procedural ruling after the case had actually begun. They represent actions which either deny the executive branch, in the

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[13] *Ex parte Bradley,* 7 Wall 364, disbarment proceeding; *Life & Fire Ins. Co.* v. *Wilson,* 8 Pet. 291, mortgage foreclosure; *Re Winn,* 213 U.S. 458, tort action; *In re Metropolitan Trust Company of the City of New York,* 218 U.S. 312, suit to declare the issuance of securities illegal; *Ex parte Metropolitan Water Co.,* 220 U.S. 539, eminent domain proceeding.

[14] In spite of the foregoing, this Court, motivated there by the same "exceptional circumstances" of the case as was the district court, suspended the issuance of the writ "so as to afford ample time for executive clemency, or such other action as may be required to meet the situation". 242 U.S. at 53.

first instance, its right to prosecute,[15] see, *Petition of United States,* 306 F.2d 737, 738 (9th Cir. 1962), or deprive it of the fruits of the conviction after trial.

The Courts below have, on occasion, in criminal cases, entertained and granted the extraordinary writ to the Government but only where the government was denied its right to prosecute[16] or deprived of the results of the

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[15] In *Fong Foo* v. *United States,* 369 U.S. 141, the Second Circuit had granted the government's petition for writ of mandamus to vacate a judgment of acquittal entered after three government witnesses had appeared and while the fourth was testifying, on the ground that the trial court was without power under the circumstances to direct the acquittal. In a *per curiam* reversal, this court never considered the government's right to mandamus, but distinguished reliance on both *Ex parte United States,* 242 U.S. 27 and *Ex parte United States,* 287 U.S. 241, on the ground that the Fifth Amendment prohibition against double jeopardy was not involved in either case and that such constitutional guarantee was violated when the Court of Appeals set aside the judgment of acquittal and directed that the defendants be tried again for the same offense.

[16] *C.f., Petition of United States,* 306 F.2d 737 (9th Cir. 1962), mandamus authorized where on a plea of *nolo contendere* to one count, district court dismissed remaining counts "in the interests of justice" (p. 738); *United States* v. *Igoe,* 331 F.2d 776 (7th Cir. 1961), cert. den. 379 U.S. 865, mandamus issued where the defendant waived jury trial but the Government refused to consent and the case was dismissed for want of prosecution. *C.f., Singer* v. *United States,* 380 U.S. 24; *United States* v. *United States District Court,* 238 F.2d 713 (4th Cir., 1956), cert. den., 352 U.S. 981, mandamus issued where the district court refused to allow subpoenas to bring records before a grand jury in its investigation. See also, *United States* v. *Hester,* 325 F.2d 654 (9th Cir., 1963) mandamus refused, though entertained, to vacate order dismissing indictment for want of prosecution for failure to grant speedy trial, Sixth Amendment right prevailed; *c.f., Fong Foo* v. *United States,* 369 U.S. 141, where Fifth Amendment right prevailed.

conviction after trial.[17] Only two cases have considered whether the government may, in a criminal case, resort to the extraordinary relief of mandamus to vacate a pretrial order entered after a proper indictment had been returned. The first of these, *United States* v. *Bondy,* 171 F.2d 642 (2d Cir. 1948), is a *per curiam* opinion, directly in point, holding that mandamus was not available to the government to vacate an order granting a bill of particulars. The second, a decision of the First Circuit, *In re United States,* 348 F.2d 624 (1st Cir. 1965), granted mandamus on petition of the Government to vacate an order of the district court providing for the taking of a deposition by the defendant under Fed. R. Crim. P. 15(a).

In *Bondy* the court noted it had no power to issue writs except in aid of its appellate jurisdiction, *Roche* v. *Evaporated Milk Ass'n,* 319 U.S. 21, 25, and that the order was interlocutory and not directly appealable, *Cogen* v. *United States,* 278 U.S. 221. Noting further the writ to be impermissible in the face of the plain indication of the legislative purpose to avoid piecemeal reviews, *United States Alkali Export Association, Inc.* v. *United States,* 325 U.S. 196, 203, and that the Criminal Appeals Act, 18 USC §3731, permitted no appeal in the instant situation, the court went on to say:

> "Accordingly we have neither actual nor potential jurisdiction to review the order, and, since our power to issue the writ is only in aid of our appellate jurisdiction, the writ should not be granted.

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[17] *United States* v. *Lane,* 284 F.2d 935 (9th Cir. 1960); *United States* v. *Gibbs,* 285 F.2d 225 (9th Cir. 1960), probation granted in a narcotics case where statute prohibited doing so.

> "The petitioner urges that we may restrain a district judge from acting beyond his jurisdiction and that the order complained of is of that character. We cannot so view it. Plainly the district court has power to grant a bill of particulars. This is expressly authorized by Rule 7(f) of the Federal Rules of Criminal Procedure, 18 U.S.C.A. . . . The most that can be urged is that the order was so sweeping as to amount to an abuse of discretion; it did not deal with matters beyond the court's jurisdiction."

To the contrary, the First Circuit in *In re United States, supra,* concluded that the otherwise interlocutory nature of the order did not preclude review by the government's application for the writ, even though its ordinary rights of appeal in a criminal case are severely limited. Its rationale was that should the Government fail to produce the witnesses,[18] or if they should refuse to testify, and should the court enter an order of contempt, then appeal would lie, *Bowman Dairy Co.* v. *United States,* 341 U.S. 214; or alternatively, if the court should dismiss the indictment should the government fail to comply, then appeal would lie under 18 U.S.C. §3731.[19] Thus, upon

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[18] It is interesting to note that the names of the two proposed principal witnesses upon whose testimony the government's case "was essentially dependent", 348 F.2d at 625, were disclosed by the government in a bill of particulars. *C.f.,* the position of the government advanced herein, that the disclosure of the names of possible witnesses is beyond the jurisdiction of petitioner and subject to review by the extraordinary writ. (R. 4, 6).

[19] This latter reasoning would appear to be contrary to the holding of the Ninth Circuit in *United States* v. *Apex Distributing Co.,* 270 F.2d 747 (9th Cir. 1959) and the reasoning of the Third Circuit in *United States* v. *Pack,* 247 F.2d 168 (3rd Cir. 1957).

such possible "conjectured appellate jurisdiction" theory the court went on to say "We see no reason why the government should not be able to do directly what it could effectuate indirectly", 348 F.2d at 625. Relying also upon the general importance of the question test used in the application of the writ to the interpretation of a civil rule, *Schlagenhauf* v. *Holder*, 379 U.S. 104, it held mandamus to lie.[20]

To accept the "what could happen" rationalization of the First Circuit as a basis for a conceivable appeal by the Government and thereby give it possible "appellate jurisdiction" for it to protect, makes virtually every order unfavorable to the Government in a criminal case subject to review by the extraordinary writ.[21] Clearly, such an approach is contrary to the ordered judicial process from which the prohibition against piecemeal appeals is meant to protect, especially in criminal cases. *Cobbledick* v. *United States*, 309 U.S. 323; *Roche* v. *Evaporated Milk Assoc.*, 319 U.S. 21, 30.

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[20] In actuality the Court of Appeals withheld the issuance of the writ "[i]n accordance with our usual practice . . . because we may assume that the District Judge will vacate his order without such." 348 F.2d at 626.

[21] It was apparently this "what could happen" rationale which prompted the court below to reverse its denial of the writ (R. 110-111) and to reconsider the merits of petitioner's order "rather than remit the government to a radical alternative appealable judgment available to the trial judge upon the government's perisistent refusal to comply" (R. 112).

In addition, the "general importance of the issue" theory relied upon by the First Circuit, if it exists at all[22] by virtue of *Schlagenhauf* v. *Holder*, 379 U.S. 104, certainly should be restricted to civil proceedings and not extended to effectively destroy the historical, statutory and judicial limitations upon the right of review by the Government in criminal cases.

While it is true that mandamus does not lie where an appeal may be had, *Roche* v. *Evaporated Milk Ass'n*, 319 U.S. 21, 27-28, the contrary—that it *does* lie where appeal may not be had,—does not necessarily follow either. *Ex parte Newman*, 14 Wall 152, 168. Moreover, though the "appellate jurisdiction" aided by the court may be "protecting a past exercise of [appellate] jurisdiction", *United States* v. *U.S. District Court*, 334 U.S. 258, 264, and not merely an existing or future appellate jurisdiction,[23] still the power to issue the writ is extended only to cases where its issuance is either an exercise of appellate jurisdiction or in aid of appellate jurisdiction. *Marbury* v. *Madison*, 1 Cranch (U.S.) 37, 185.

Nor should the extraordinary writ issue irrespective of the foregoing well-established judicial criteria on a theory of some super-power of appellate courts to conduct the administration of the business of the district courts. C.f., *United States* v. *United States District Court*, 238 F.2d 713 (4th Cir., 1956). Indeed, if an administrative or

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[22] See, dissent of Mr. Justice Harlan expressing concern lest any question of first impression geared to an allegation of lack of power "would open the door" to the use of the extraordinary writ to test *any* question. 379 U.S. at 129.

[23] See, *United States* v. *Mayer*, 235 U.S. 55, and *United States* v. *Smith*, 331 U.S. 469, where the writ of mandamus was issued, in essence, to protect the efficacy of a prior mandate of the appellate court.

"business of the court's" concept is adopted for review by mandamus of the actions of the lower court, no such writ would ever be held to be beyond the jurisdiction of the appellate court to grant. Yet, this court has concluded, at least where legislative policy is contrary to any review, that an appellate court may not resort to mandamus. *United States* v. *Rice,* 327 U.S. 742, 749.

Thus, a statute by its terms may preclude review of a lower court's decision by way of appeal and through implication be held to similarly preclude review of such decision by mandamus as well. See, *In the Matter of Mathew Addy Steamship & Commerce Corporation,* 256 U.S. 417; *Employer's Reinsurance Corp.* v. *Bryant,* 299 U.S. 374; *Ex parte Sherman,* 124 U.S. 364; *Ex parte Pennsylvania Co.,* 137 U.S. 451, 454; and, *Ex parte Baldwin,* 291 U.S. 610. Moreover, there would seem to be no Constitutional prohibition against Congressional action specifically providing that judicial acts specified therein cannot be reviewed by mandamus.

However, where this Court has looked with disfavor on piecemeal government review in criminal cases, *Carroll* v. *United States,* 354 U.S. 394; *Cobbledick* v. *United States,* 309 U.S. 323; *Di Bella* v. *United States,* 369 U.S. 121, and where appeals by the Government in criminal cases are severely restricted by statute, though such statutes do not specifically prohibit mandamus in other instances, the reasoning of *United States* v. *Rice, supra,* permits the conclusion that mandamus herein is precluded by statutory implication. The decision in the instant proceeding, how-

ever, need not turn on this conclusion alone. Indeed, petitioner does not urge that it does. Instead, some balancing of each of the foregoing factors must be made in order to arrive at a just standard of the right of the government to review by mandamus in a criminal case. Thus, balancing the inherent protections historically afforded defendants in criminal proceedings: constitutional,[24] statutory,[25] and judicial,[26] against the rights of the sovereign to proceed with its duty to prosecute[27] and to retain the results of its prosecution,[28] petitioner urges that mandamus should not lie on application of the government in a criminal case to review an interlocutory order of the district court which does not deny the Government the right to proceed to prosecution or take from it the results of a conviction.

The foregoing suggested limitation on the discretion to issue the writ is founded on principles which have always found protection by this Court. Thus, unfettered review by the use of the writ by the Government in a criminal case may interfere with the right to a speedy trial guaran-

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[24] Fifth and Sixth Amendments.

[25] 18 USC 3731.

[26] *Carroll* v. *United States,* 354 U.S. 394; *Cobbledick* v. *United States,* 309 U.S. 323.

[27] *Ex parte United States,* 287 U.S. 241.

[28] *Ex parte United States,* 242 U.S. 27; *United States* v. *Mayer,* 235 U.S. 55; *United States* v. *Smith,* 331 U.S. 469.

teed by the Sixth Amendment.[29] The "anxiety and concern accompanying public accusation," and the other harsh accoutrements attendant to the delay accompanying an interlocutory review procedure made available to the Government are sure to descend upon the defendant:

> "The pendency of the indictment may subject him to public scorn and deprive him of employment, and almost certainly will force curtailment of his speech, associations and participation in unpopular causes." *Klopfer* v. *North Carolina*, 386 U.S. 213, 221.

Furthermore, the principles underlying the prohibition in the Fifth Amendment guarantee against being "twice put in jeopardy of life or limb" are not far removed from the theory upon which petitioner urges the above stated limitation on Government use of the extraordinary writ in criminal cases. The unlimited resources of the Government to press repeatedly for successive reviews of interlocutory orders in a criminal case could bleed the defendant's mental and material coffers dry. Often, as in the instant case, a writ of mandamus has the unfortunate consequence of making the judge a litigant obliged to leave his defense to one of the litigants before him. *Ex parte Fahey*, 332 U.S. 258. Of course, it is the defendant who must bear the expense, and consequently, the theory of this

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[29]At one point in the instant case, petitioner had indicated a propensity to continue the cause indefinitely until the Government complied with his order (R. 80) but the defendant raised the Sixth Amendment issue and the matter was set down for a date certain (R. 108-110).

The Court may note further that it will be approximately two years from the date the order granting the bill of particulars was issued to the approximate date of decision in this matter. Though it is *dehors* the record, a critical defense witness has died during the interim delay.

court's reasoning set forth in *Green* v. *United States*, 355 U.S. 184, 187-188 is equally appropriate here:

> "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty".

It is thus clear that if the rights of an accused, justifiably paramount to those of the sovereign, are to prevail in an area to date unencroached upon by the Congress, the inexorable erosion of that principle must be halted by this court's restriction of the right of governmental review through the use of the extraordinary writ. Petitioner does not urge that the Government has no right whatsoever to the writ in a criminal case. To the contrary; but such rights must be finely counterbalanced with the inherent rights of a defendant. Governmental review must fail, in such balance, here, where the district court's interlocutory order did not terminate the prosecution or preclude it from the results of a conviction.

II.

DISTRICT COURT'S ORDER GRANTING A BILL OF PARTICULARS WHICH MAY DISCLOSE, IN PART, THE NAMES OF SOME PROSPECTIVE WITNESSES IS EXERCISE OF DISCRETION WITHIN PRESCRIBED JURISDICTION AND NOT TO BE DISTURBED BY COURT OF APPEALS.

If this Court concludes either that the court below had jurisdiction to entertain the petition for the extraordinary

writ, or at least that its discretion to act upon such a petition by the Government to vacate a procedural order in a criminal case was not inherently circumscribed, the issue next to be resolved is whether it correctly exercised its discretion in granting the writ. If the mandamus power thus exists irrespective of the dichotomy between civil and criminal cases, the standards of either specie of case are applicable to determine the proper issuance of the writ.

A. A Court Of Appeals May Not Substitute Its Discretion For That Of An Inferior Court Acting Within The Limits Of Its Jurisdiction:

The traditional use of the writ, both at common law and in the federal courts, "has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its authority to do so." *Roche* v. *Evaporated Milk Ass'n.*, 319 U.S. 21, 26.

The writ was issued below to vacate an order granting a bill of particulars. It is indisputable that petitioner had the discretion under Rule 7(f), Federal Rules of Criminal Procedure,[30] to grant or deny such a request. *Wong Tai* v. *United States*, 273 U.S. 77. It is clear therefore that some action taken by him on the motion was within his jurisdiction to act. The court below, however, must have issued the writ "to confine [petitioner] to a lawful exercise of its prescribed jurisdiction" within the *Roche* v. *Evaporated Milk Ass'n.*, test, *supra*,[31] since it is clear that this

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[30] Rule 7(f), F.R.Cr.P., as then constituted, stated, in pertinent part:

"The Court for cause may direct the filing of a bill of particulars."

[31] The court below rendered no opinion and offered no reasons for its issuance of the writ (R. 113).

case does not involve a refusal to adjudicate issues presented to it. C.f., *Ex parte United States*, 287 U.S. 241.

The ruling made by petitioner on the request for particulars was made in the course of the exercise of the court's jurisdiction to decide issues properly brought before it. In considering an exercise of a district court's action within its prescribed jurisdiction, this Court in a civil case, relating to the issuance of an interlocutory order stated:

> "In strictly circumscribing piecemeal appeal, Congress must have realized that in the course of judicial decision some interlocutory orders might be erroneous. The supplementary review power conferred on the Courts by Congress in the All Writs Act is meant to be used only in the exceptional case where there is clear abuse of discretion or 'usurpation of judicial power' of the sort held to justify the writ in DeBeers Consol. Mines v. United States, 325 U.S. 212, 217, 89 L.Ed. 1566, 1572, 65 S.Ct. 1130 (1946)". *Bankers Life & Cas. Co.* v. *Holland*, 346 U.S. 379, 383.

Since the order entered in *DeBeers* was one which it had no power whatsoever to enter, only the question of petitioner's exercise of discretion, or "clear abuse" thereof, is here to be considered.[32]

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[32] The type of action occurring in *DeBeers Consol. Mines* v. *United States, supra*, giving rise to the exceptional application of the writ to an interlocutory order is clearly inapplicable to the situation here. In *DeBeers*, a preliminary injunction was granted which was urged by the restrained parties to constitute a sequestration of property beyond the power of the court. This court held the order was not made to grant interlocutory relief such as could be afforded by any final injunction, but was one "respecting a matter lying wholly outside the issue in the case; no decision of the suit on the merits can redress any injury done by the order . . ." 325 U.S. at 218. In effect, mandamus lay because the lower court had no power whatsoever to enter such an order. This is clearly not the case at hand.

While the issuance of the extraordinary writ is itself generally a matter of discretion for the court below, *LaBuy v. Howes Leather Co.*, 352 U.S. 249, 260; *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379; 6 Moore, Federal Practice, ¶54.10[4] (1953 ed.), the appellate court may not substitute its discretion for that of the lower court, if the district court's discretion is within the limits of its jurisdiction. *Re Winn*, 213 U.S. 458, 467-468.

The nature of the writ issued here is as was stated by Mr. Justice Story in *Ex parte Hoyt*, 13 Pet 279, 290:

> "[The writ] is neither more nor less than an application for an order to reverse the solemn judgment of the district judge, in a matter clearly within the jurisdiction of the court, and to substitute another judgment in its stead."

Mandamus may only be used to require an inferior court to decide a matter within its jurisdiction, not to control the decision. *Ex parte Loring*, 94 U.S. 418; *Ex parte Morgan*, 114 U.S. 174; *Ex parte Wagner*, 249 U.S. 465; see, *Ex parte Slater*, 246 U.S. 128. The action of the appellate court here, was to impermissably substitute its discretion for that of petitioner.

B. Petitioner Acted Within The Limits Of His Jurisdiction And Did Not Abuse His Discretion In Granting The Disputed Bill Of Particulars.

1. The scope of "clear abuse of discretion."

The mere fact that petitioner may have committed an error of judgment in granting the bill of particulars (a fact not conceded, see below pp. 38-44) does not oust him from jurisdiction to make the decision and thus subject it to control by mandamus, *Bankers Life and Casualty Co.*

v. *Holland,* 346 U.S. 379, 382. Indeed, if any support can be offered for the action of the court below, it must be predicated on the theory that petitioner's interlocutory order was not merely "erroneous" but a "clear abuse of discretion", *Bankers Life & Casualty Co.* v. *Holland, supra,* at p. 383, since jurisdiction to grant a bill of particulars is vested in the district court's "sound discretion". *Wong Tai* v. *United States,* 273 U.S. 77, 82.

Any inquiry of what is a "clear abuse" of judicial discretion is confined to whether the situation and circumstances clearly show arbitrary action not justifiable in view of such situation and circumstances. *Hartford-Empire Co.* v. *Obear-Nester Glass Co.,* 95 F.2d 414, 417 (9th Cir. 1938). This Court, in reviewing the familiar principles governing the exercise of judicial discretion, stated:

> "That exercise implies conscientious judgment, not arbitrary action. The Styria v. Morgan, 186 U.S. 1, 9, 46 L.Ed. 1027, 1033, 22 S.Ct. 731. It takes account of the law and the particular circumstances of the case and 'is directed by the reason and conscience of the judge to a just result.' Langues v. Green, 282 U.S. 531, 541, 75 L.Ed. 1027, 1033, 22 S.Ct. 731." *Burns* v. *United States,* 287 U.S. 216, 222-223.

In *In re Josephson,* 218 F.2d 174, 182 (1st Cir. 1954) "abuse of discretion" was interpreted in light of the exercise of the extraordinary writ:

> "All it need mean is that, when judicial action is taken in a discretionary matter, such action cannot be set aside by a reviewing court unless it has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors. One is reminded of the 'clearly erroneous' standard in Rule 52(a) of the Federal Rules of Civil Procedure, 28 U.S.C."

See also, *McBee* v. *Bomer,* 296 F.2d 235 (6th Cir. 1961).

Respondent, in seeking the writ, was not only obliged, therefore, to show that its right to it was "clear and indisputable", *United States* v. *Duell,* 172 U.S. 576, 582, but that petitioner's action was "arbitrary" and was a "clear error of judgment."[33] This it did not and could not do.

2. In light of the relevant factors of the case, petitioner's judgment was a permissible exercise of his authorized discretion.

The purpose of a bill of particulars "is to furnish to the defendant further information respecting the charge stated in the indictment when necessary to the preparation of his defense, and to avoid prejudicial surprise at the trial", *United States* v. *Glaze,* 313 F.2d 757, 759 (2d Cir. 1963); *United States* v. *Ansani,* 240 F.2d 216, 223 (7th Cir. 1957), cert. den. sub nom. *Milner* v. *United States,* 353 U.S. 936; *Azcona* v. *United States,* 257 F.2d 462, 464 (5th Cir. 1958), and when necessary for those purposes, an accused is entitled "as of right" for the bill to be granted even though it requires "the furnishing of information which in other circumstances would not be required because evidentiary in nature". *United States* v. *United States Gypsum,* 37

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[33] Compare to the showing of prejudice demanded of a defendant seeking reversal on appeal of a conviction predicated upon failure to grant a bill of particulars, *i.e.,* either that the defendant was surprised by evidence he was unprepared to meet, or that he was unable to prepare a proper defense because of the insufficiency of the charge. *United States* v. *White,* 370 F.2d 559, 560 (7th Cir. 1966); *United States* v. *Cohen,* 145 F.2d 82 (2d Cir. 1944), cert. den., 323 U.S. 799; *Medrano* v. *United States,* 285 F.2d 23 (9th Cir. 1960), cert. den. 366 U.S. 968.

F.Supp. 398, 402, (1941), *United States* v. *Smith*, 16 FRD 372, 375 (W.D.Mo., 1954). See also, *Singer* v. *United States*, 58 F.2d 74 (3rd Cir. 1932).

Within these accepted standards of the purpose of the bill of particulars, petitioner contends that his order directing the disclosure in request 25 of relevant information pertaining to oral statements made by the defendant upon which the Government relies, including the names and addresses of persons to whom and in whose presence such statements were made, was not a "'clear error of judgment,'" or "clear abuse of his discretion" warranting the issuance of the extraordinary writ.

The indictments against the defendant below had charged him with making and subscribing false corporate income tax returns, wherein corporate gross sales were understated, in violation of 26 USC. §7206(1), 68A Stat. 852 (R. 13, 14). In his request for bill of particulars he urged that the language of the indictments and the absence therefrom of any details, made them so vague and indefinite "so as to make it impossible for him to plead a conviction or an acquittal thereon in a bar of a second possible prosecution for the same offense, and, further that he will be unable to make adequate preparation of a defense . . ." (R. 21-22).

By some of several requests, the defendant had sought and petitioner had ordered disclosure of the names and addresses of the persons from whom the unreported sales were received, (R. 16); each unreported item of gross sales and the names and addresses of from whom received, if the specific item method of proof was to be used (R. 17); if oral statements of the defendant were to be relied upon, the names and addresses of the persons to whom made and of persons present, date, and place the state-

ments were made and whether the government had memoranda thereof in its possession (R. 20); and, the names and addresses of other persons upon whose oral statements the government did rely (R. 21).

Claiming these four requests constituted a "list of witnesses", respondent refused to comply with the order. (R. 68, *et seq.*). Ultimately, petitioner vacated his order granting the names and addresses of persons other than defendant whose statement would be relied upon (R. 87), and respondent answered two requests. The government claimed in one answer it did not know the names of those from whom unreported gross receipts were received (R. 42) but in the other, furnished the names of 22 customers whose testimony would prove "specific items of sales which are not properly reflected in the records" (R. 46) of the company.

After some concession, the remaining request, which is here in issue, was limited to furnishing the names and addresses of *non-government* persons to whom the defendant made statements material to the proceedings, the date and place made, the names and addresses of others present, and whether a written memorandum or verbatim transcript of the oral statements was made, and if so whether the government had possession of it. Respondent conceded such oral statements to be admissions of the defendant which were to be used at the trial (R. 85).

Respondent's persistent claim before petitioner (R. 68), and in its petition for the writ (R. 5) that a list of witnesses was being ordered furnished which is contrary to 18 USC §3432, 62 Stat. 831, is belied by the obvious fact that a list of witnesses, being an enumeration of *all witnesses* who will testify at the trial, *Bird* v. *United States*, 187 U.S. 118; *Logan* v. *United States*, 144 U.S. 263, would

include the names of persons other than defendant whose oral statements respondent asserts are relied upon to support the charges (R. 28). However, since this request was denied (R. 87), the most that can be urged is that the names of *some* possible witnesses may be disclosed.[34]

After concluding that the proper scope of a bill of particulars is a question left largely to the sound discretion of the trial judge, petitioner analyzed the request. His reasoning is revealing and appropriate to this Court's consideration of whether he "clearly abused" his discretion in granting the request.

> "It is by no means clear that the names thus provided will be a list of witnesses to be called by the prosecution. That some may be called is obvious. However, it is equally obvious that not all must necessarily be called and customarily are not. Also equally obvious is the fact that others besides persons present at such times may be called as witnesses as, for example agents who investigated transactions involving the defendant by interviewing the other parties thereto, accounting witnesses who testify to computations made by them, etc. *The reason for requiring disclosure of their names, however, is not that they will or may be witnesses, but that the defendant requires identification of the times, places and persons present in order to prepare his defense.* Moreover, if the government has any basis for contending that such disclosure will in-

[34] See Brief for the United States In Opposition to the Petition for Certiorari, herein, (pp. 6-10) where no contention was made that a "list of witnesses" was herein involved. Suffice it to say, even if respondent persists in this claim, 18 USC §3432 is no statutory bar to such order, but merely is a legislative pronouncement, that such list *must* be given in a capital case. This court has implied that a district court could, if it wished, in a non-capital case, furnish the matters only required by the statute in a capital case, *United States* v. *Van Dusee*, 140 U.S. 169, 173.

volve physical risk to the individuals or prejudice the government in its ability to produce its evidence, they have not so indicated. Absent such a showing, the defendant is entitled to have the information." (R. 59-60). (Emphasis added)

While the mere fact that the Government may be required to disclose some of its evidence is not, in and of itself, grounds for *denial* of the bill of particulars, *United States* v. *Casserino,* 189 F.Supp. 288 (E.D.N.Y. 1960); *United States* v. *Lipshitz,* 150 F. Supp. 321 (E.D.N.Y. 1957); *United States* v. *Bentvena,* 193 F. Supp. 485 (S.D.N.Y. 1960), cert. den., 375 U.S. 940; *United States* v. *Cimino,* 31 F.R.D. 277 (S.D.N.Y. 1962), cert. den. 375 U.S. 974; *United States* v. *Miller,* 210 F. Supp. 716 (S.D. Tex. 1962); *United States* v. *Smith,* 16 F.R.D. 372 (W.D.Mo. 1954), nevertheless, petitioner's order requires no disclosure of evidence (R. 69), of any legal theories (R. 64), nor even of the substance of the statements made by the defendant (R. 92).

In many cases, the names of actual or potential witnesses have either been disclosed by a bill of particulars, or such disclosure has been discussed with approval. *Kirby* v. *United States,* 174 U.S. 47; *United States* v. *Debrow,* 346 U.S. 374; *United States* v. *White,* 370 F.2d 559 (7th Cir. 1966); *In Re United States,* 348 F.2d 624 (1st Cir. 1965); *United States* v. *Glaze,* 313 F.2d 757 (2d Cir. 1963); *Scott* v. *United States,* 342 F.2d 813 (3rd Cir., 1965); *Ong* v. *United States,* 131 F.2d 175 (4th Cir. 1942); *United States* v. *Lamas,* 337 F.2d 349 (6th Cir. 1964); *Stubbs* v. *United States,* 1 F.2d 837 (9th Cir. 1924); *Patterson* v. *United States,* 344 F.2d 693 (10th Cir. 1965); *United States* v. *Spur Knitting Mills, Inc.,* 187 F. Supp. 653, 654 (S.D.N.Y. 1960); *United States* v. *Miller,* 210 F. Supp. 716 (S.D. Tex. 1962); and see *United States* v. *Bryson,* 16 F.R.D. 431 (N.D. Cal., 1954) cert. den., 355 U.S. 817 noting a

practice in the District of Columbia to furnish defendant with a list of witnesses the government intended to present at the trial in non-capital cases. *United States* v. *Genstil,* 205 F.Supp. 604 (D. Mass., 1962); *United States* v. *Guterma,* 179 F.Supp. 417 (E.D.N.Y. 1959); *United States* v. *McKay,* 45 F.Supp. 1007 (E.D. Mich. 1942); *United States* v. *Cafaro,* 26 F.R.D. 170 (S.D.N.Y. 1960); *United States* v. *Ricciardi,* 40 FRD 133, (S.D.N.Y. 1965), aff'd 357 F.2d 91, cert. den. 384 U.S. 942. Moreover, many courts have commented that the disclosure of the names of witnesses is discretionary,[35] *Barnes* v. *United States,* 347 F.2d 925, 929 (8th Cir., 1965); *United States* v. *Frank,* 23 FRD 145 (D.D.C. 1959); *United States* v. *Solomon,* 26 FRD 397 (S.D. Ill. 1960); c.f. *Downing* v. *United States,* 348 F.2d 594 (5th Cir., 1965) cert. den., 382 U.S. 901.

Since the government was unable to make any showing that any harm or potential harm would befall the persons whose names would be disclosed (R. 59-60, 75, 76) no prejudice exists to the government by such disclosure. C.f. *Gordon* v. *United States,* 344 U.S. 414; *Barnes* v. *United States,* 347 F.2d 925 (8th Cir. 1965). The trial could have proceeded without delay by such disclosure, whereas defendant's surprise occasioned by such withholding could lead to delay during the trial (R. 93).

The Government's approach to the subject order has been "more in the spirit of a ride to hounds than a fair

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[35] Though petitioner has no doubt that disclosure of potential witnesses has occurred in many cases, the *granting* of a bill of particulars is not often reported. This is certainly true as to opinions of the various Circuit Courts of Appeal, for unless a district court is reversed for abusing its discretion in *not* furnishing the bill, an unusual event in light of the broad discretion vested in it, *Wong Tai* v. *United States,* 273 U.S. 77, but see, *Singer* v. *United States,* 58 F.2d 74 (3rd Cir. 1932), the only other possible reported opinion would be by virtue of mandamus. Only one such opinion has been found. *Bondy* v. *United States,* 171 F.2d 642 (2d Cir. 1948).

minded pursuit of the truth'' *United States* v. *Glaze,* 313 F.2d 757, 761 (2d Cir. 1963). It is clear, that petitioner had exercised a broad right of discretion existent in him as a judge of the district court. More particularly, he sought, by his order, to furnish defendant with no more than other courts have from time to time ordered disclosed. There was no abuse of discretion. In any event, under no circumstances could the court below have concluded that his order was the ''clear error of judgment in the conclusion reached upon a weighing of the relevant factors'', *In re Josephson,* 218 F.2d 174, 182 (1st Cir. 1954), which must be found before mandamus could issue to direct the vacation of his order.

It necessarily follows, therefore, that the writ of mandamus was improvidently issued.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed, with directions to vacate the order issuing the writ of mandamus against petitioner directing him to vacate his order upon respondent to answer question 25 in defendant's motion for bill of particulars in the case entitled *United States of America* v. *Simmie S. Horwitz,* No. 65 CR 464, pending before petitioner in the United States District Court for the Northern District of Illinois, Eastern Division.

Respectfully submitted,

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August, 1967

APPENDIX

Constitutional Provisions, Rule and Statutes Involved

The Fifth Amendment to the Constitution of the United States provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Sixth Amendment to the Constitution of the United States provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence."

§7206(1) Internal Revenue Code 1954 (26 U.S.C. 7206 (1)) provides:

"Any person who willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter, shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000.00, or imprisoned not more than 3 years, or both, together with the costs of prosecution."

Section 1404, Title 18 United States Code provides:

"In addition to any other right to appeal, the United States shall have the right to appeal from an order granting a motion for the return of seized property and to suppress evidence made before the trial of a person charged with a violation of

"(1) any provision of part I or part II of subchapter A of chapter 39 of the Internal Revenue Code of 1954 the penalty for which is provided in subsection (a) or (b) of section 7237 of such Code,

(2) subsection (c), (h), or (i) of Section 2 of the Narcotic Drugs Import and Export Act, as amended (21 U.S.C., sec. 174), or

(3) the Act of July 11, 1941, as amended (21 U.S.C., sec. 184a).

"This section shall not apply with respect to any such motion unless the United States attorney shall certify, to the judge granting such motion, that the appeal is not taken for purposes of delay. Any ap-

peal under this section shall be taken within 30 days after the date the order was entered and shall be diligently prosecuted."

Section 1651(a), Title 28 United States Code provides:

"The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

Section 3432, Title 18 United States Code provides:

"A person charged with treason or other capital offense shall at least three entire days before commencement of trial be furnished with a copy of the indictment and a list of the veniremen, and of the witnesses to be produced on the trial for proving the indictment, stating the place of abode of each venireman and witness."

Section 3731, Title 18 United States Code provides:

"An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:

"From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

"From a decision arresting a judgment of conviction for insufficiency of the indictment or information, where such decision is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

"From the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy.

"An appeal may be taken by and on behalf of the United States from the district courts to a court of appeals in all criminal cases, in the following instances:

"From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof except where a direct appeal to the Supreme Court of the United States is provided by this section.

"From a decision arresting a judgment of conviction except where a direct appeal to the Supreme Court of the United States is provided by this section.

"The appeal in all such cases shall be taken within thirty days after the decision or judgment has been rendered and shall be diligently prosecuted.

"Pending the prosecution and determination of the appeal in the foregoing instances, the defendant shall be admitted to bail on his own recognizance.

"If an appeal shall be taken, pursuant to this section, to the Supreme Court of the United States which, in the opinion of that Court should have been taken to a court of appeals, the Supreme Court shall remand

the case to the court of appeals, which shall then have jurisdiction to hear and determine the same as if the appeal had been taken to that court in the first instance.

"If an appeal shall be taken pursuant to this section to any court of appeals, which, in the opinion of such court, should have been taken directly to the Supreme Court of the United States, such court shall certify the case to the Supreme Court of the United States, which shall thereupon have jurisdiction to hear and determine the case to the same extent as if an appeal had been taken directly to that Court."

Section 1291, Title 28, United States Code provides:

"The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

Rule 7(f) Federal Rules of Criminal Procedure provides:

"The court for cause many direct the filing of a bill of particulars. A motion for a bill of particulars may be made only within ten days after arraignment or at such other time before or after arraignment as may be prescribed by rule or order. A bill of particulars may be amended at any time subject to such conditions as justice requires."

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 36

HONORABLE HUBERT L. WILL, JUDGE, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of petitioner, refusing to vacate certain portions of his order granting a bill of particulars in a criminal case (R. 58–60), is not reported. The original order of the court of appeals denying the government's petition for a writ of mandamus (R. 110–111), and its order granting the writ after reconsideration (R. 113), are not reported.

JURISDICTION

The order of the court of appeals, directing petitioner to vacate his order that the government furnish certain particulars, was entered on October 4, 1966

(R. 113), and a petition for a rehearing *en banc* was denied on December 5, 1966 (R. 113–114). The petition for a writ of certiorari was filed on December 29, 1966, and granted on March 13, 1967 (R. 115). 386 U.S. 955. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Petitioner is a federal district judge. In a proceeding for criminal tax evasion, he ordered the government to disclose to the defense, in its bill of particulars, the names and addresses of all private individuals to whom, or in whose presence, the defendant had made any admissions or other relevant statements. The question presented is whether, in view of the limitations which the Federal Rules of Criminal Procedure place on discovery, the judge's action constituted a clear abuse of discretion that the court of appeals could properly correct by issuing a writ of mandamus.

RULES INVOLVED

Rules 7(f), 15 and 16 of the Federal Rules of Criminal Procedure, as amended to July 1, 1966, are printed in the Appendix, *infra*, pp. 28–32.

STATEMENT

In June 1965, Simmie S. Horwitz was indicted in the United States District Court for the Northern District of Illinois on charges of wilfully subscribing 1958 and 1959 corporate income tax returns of Scott Pharmacy, Inc., which—as he well knew—understated the corporation's actual sales, in violation of 26 U.S.C. 7206(1) (R. 13–15).

The defendant, contending that the indictment was so vague and indefinite that he could not determine the exact nature of the charges or prepare an adequate defense (R. 21–22), filed a motion for a bill of particulars asking that the government be required to answer 30 Requests, set forth below,[1] covering every

[1] 1. State what is the specific act or acts the Government alleges to have been committed by the Defendant in each of the years 1958 and 1959 in violation of Section 7206(1).

2. State what act or acts did the Defendant perform in order to "make" the United States Income Tax Return which are the subject of the captioned Indictments. Give the date and place of each such act.

3. State what act or acts did the Defendant perform in order to "subscribe" the United States Income Tax Returns which are the subject of the captioned Indictments. Give the date and place of each such act.

4. State with specificity what criminal act or acts were performed by the Defendant on June 16, 1959, as alleged in Indictment 65 CR 432.

5. State the alleged correct amount of the gross sales for Scott Pharmacy, Inc. for each of the years 1958 and 1959.

6. State respectively for each of the said years the amount and source of each and all of the items added to the reported gross sales in computing the amounts stated in answer to Request No. 5.

7. In describing the items requested in Request No. 6, state the date received, the gross amount, the name and address of from whom received, and the nature, amount and date paid, and the payee, date, and amount of any deductions allowed or allowable against the said gross amounts.

8. State the amount and source of each and all of the items of deduction allowed in computing the alleged correct amount of gross sales for each of the said years.

9. State the amount and source of each and all of the items of deduction disallowed in computing the alleged correct amount of gross sales for each of the years.

10. State whether the Government relies upon any books, records, documents or other papers of Scott Pharmacy, Inc. obtained by the Internal Revenue Service. If so, state with

detail of the alleged offenses (R. 16–21). At a hearing on November 29, 1965, petitioner directed the government to answer all the defendant's Requests, with the exception of Nos. 4 and 29(b) (R. 10, 53, 63–64). The government objected that, if required to answer 29(a),

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specificity which such books, records, documents or other papers or portion thereof, when the same were obtained, where obtained, and by whom and from whom obtained.

11. State whether the Government will rely on proof upon the net worth, expenditures, bank deposits, or other theory or method of proof and, if so, whether said theory will be relied upon in whole or in part as corroborative of any other method of proof, including the specific receipt method. State also whether the said method of proof applies to proof of additional gross sales of the Corporation and/or income or other benefit to the Defendant.

12. In the event the Government has determined the unreported gross sales of the Corporation and/or income or benefit to the Defendant for either of the years upon the so-called net worth and/or expenditures method, then state the character and value of each asset owned by the Corporation and/or the Defendant, including the amount of cash on hand, on deposit, and receivables at the beginning and end of each of the said years covered by the Indictments.

13. In the event the Government has determined the unreported gross sales of the Corporation and/or income or benefit to the Defendant for either of the said years in reliance in whole or in part upon the so-called bank analysis or bank deposit method, list the bank accounts analyzed and itemize the deposits alleged to constitute unreported gross sales, setting forth the source, where known, deposits constituting transfers or redeposits and deposits conceded to be non-income items.

14. In the event the Government has determined the unreported gross sales of the Corporation and/or income or benefit to the Defendant for either of the years upon the specific item method, list each such item, including the name and address of the payor, the date paid, the amount, and the disposition by the Corporation of each of such receipts.

15. State whether any of the alleged unreported gross sales was received directly, in each of the said years, by the De-

it would have to disclose the names of all prosecution witnesses, thus exposing them to harassment (R. 64–66). Petitioner stated that he might reconsider his ruling, but was emphatic that he would not do so un-

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fendant, and, if so, identify the date and amount of such direct receipts.

16. State whether the alleged unreported gross sales in each of the said years was indirectly received by the Defendant and, if so, state the date, amount, and nature of such receipts.

17. State upon which line and page of each of the respective United States Income Tax Returns alleged in the Indictments there appears the material matter alleged to be believed by the Defendant as not true and correct.

18. Does the Government claim there are any other material matters contained in each of the respective U.S. Income Tax Returns alleged in the Indictments which are not true and correct and which the Defendant believed were not true and correct when he allegedly subscribed the said returns.

19. If the answer to Request No. 18 is in the affirmative, state as to each such material matter:

a. The nature thereof;

b. Wherein the same appears on the respective income tax return;

c. The correct material matter, including the amount and source, the date received or expended, and the payor or recipient thereof.

20. Is the Government now in possession of any books, papers, documents or tangible objects obtained from or belonging to the Defendant or obtained from others by seizure or by process.

21. If the answer to Request No. 20 is in the affirmative, state with particularity:

a. The nature and description of each such book, paper, document, or tangible object;

b. From whom obtained;

c. When obtained;

d. Whether the same was obtained by seizure or by process;

e. The nature of the process;

f. Whether the Government intends to rely on all or part

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less the government made a reasonable showing that witnesses were being harassed (R. 65–66).

The government moved that petitioner vacate his previous order insofar as it directed answers to Requests 7, 14, 25, 28 and 29(a), on the ground that such answers would furnish a list of the government's witnesses. The motion was heard on December 3, 1965 (R. 10, 11, 68–78). Petitioner acknowledged that he had made it a practice to require the prosecution to

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of the said books, papers, documents, or tangible objects, and, if so, which part or parts, and for what purpose.

22. Does the Government rely upon any acts, including but not limited to the acts stated in the respective counts of the Indictments, performed by the Defendant to support the charge in the several counts of the Indictments that the Defendant made and subscribed a return which he did not believe to be true and correct as to every material matter.

23. If the answer to Request No. 22 is in the affirmative, state with respect to each such act, if there was more than one:

a. The nature of the act;

b. The date on which it was performed;

c. The place where it was performed; and

d. The names and addresses of persons, other than the Defendant, present when the act was performed.

24. Does the Government rely upon any oral statements of the Defendant to support the charge in the several counts of the Indictments.

25. If the answer to Request No. 24 is in the affirmative, state with respect to each such statement, if there was more than one:

a. The name and address of the person to whom the statement was made;

b. The date on which the statement was made;

c. The place where it was made;

d. The substance of the statement;

e. Whether the persons to whom the statement was made was a Government Agent at the time of the statement;

f. The names and addresses of any other persons present at the time the statement was made; and

g. Whether a written memorandum or verbatim tran-

turn over to the defense the names of all persons known to have participated in or to have been present at the alleged offense, in order to enable the defense to interview them and ascertain their prospective testimony (R. 68–78, *passim*). Petitioner stated that this was not the same as requiring the prosecution to turn over a list of witnesses, because it was very likely that some of these persons would not be called as witnesses at the trial (R. 68–71, 77). Petitioner said (R. 75):

> You know, I have great concern that in a civil case we require both sides to submit their wit-

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script of the oral statement was made, and, if so, whether the Government has possession of the memorandum or transcript.

26. Does the Government rely upon any written statement of the Defendant to support the charge in the several counts of the Indictments.

27. If the answer to Request No. 26 is in the affirmative, state with respect to each such written statement, if there was more than one:

a. The date the written statement was made;

b. The names and addresses of the person or persons to whom the said written statement was given;

c. The substance of the written statement; and

d. Whether the statement is now in the possession of the Government.

28. Does the Government rely upon the statement of any person, other than the Defendant, to support the charge in the several counts of the Indictments.

29. If the answer to Request No. 28 is in the affirmative, state with respect to each such person, if there is more than one:

a. The name and address of each such person or persons; and

b. The substance of their statements.

30. State whether the Government will rely in full or in part on the truth or falsity of any personal United States Income Tax Returns filed by the Defendant. If so, state which returns and the particular matter contained therein upon which the Government will rely.

> nesses to maximum deposition when all that is involved is money. In a criminal case, the government doesn't even want to disclose the name of a person so the other side can go out and interview him when what is concerned is life or liberty. To me this is a very strange aberration of the processes of justice as between civil and criminal cases. * * *

The prosecutor pointed out that there was a distinction in that, in criminal cases, there was always "more chance, more reason to construct a fabrication" (R. 76). Petitioner indicated that he would rule differently if such were the fact, but that there had been no showing that either harassment of the witnesses or fabrication of evidence was likely to occur in this case (R. 75, 76–77).[2] On December 7, 1965, the motion to vacate the previous order was denied, except that the government was excused from answering Request 25(d) (R. 54, 58–60).

The government filed a bill of particulars on December 10, 1965 (R. 11, 22–34), with amendments thereto on January 4 and March 14, 1966 (R. 11–12, 34–52), which together provided answers to all Requests the government had been directed to answer except 25 and 29(a). At a hearing on the morning of January 4, 1966, the government informed petitioner

[2] In response to the prosecutor's comment that petitioner's liberal view had not been adopted by the American Bar Association [*sic*] in its proposed amendments to criminal discovery procedure, petitioner conceded that he "would go further than they go" (R. 77). The reference was apparently to the amendments prepared by the Advisory Committee on the Criminal Rules, which were, at the time of the hearing, still pending before this Court.

that it would respectfully refuse to answer those Requests.[3] Counsel for defendant then moved, in the alternative, that the indictment be dismissed or the United States Attorney be held in contempt. Petitioner, however, simply ruled that he would postpone the trial indefinitely (R. 78–80). That afternoon, upon complaint by defense counsel that petitioner's ruling would deprive Horwitz of a speedy trial, petitioner altered the ruling to give the government 60 days to reconsider its stand (R. 80–82).

After the expiration of the 60-day period, there was another hearing, on March 7, 1966. (R. 82–89). Petitioner withdrew his direction that the government answer Request 29(a), which, in effect, called for a list of all the government's witnesses. He explained that he did so "just to keep the record clear" and in order to have "no question about the propriety" of his action, should he decide to dismiss the indictment (R. 87). Petitioner insisted, however, that Request 25 be answered, and he gave the government an additional week for consideration (R. 88–89). This Request states (R. 20):

> 25. If [the government relies upon any oral statements of the defendant], state with respect to each such statement, if there was more than one:
>
> a. The name and address of the person to whom the statement was made;
>
> b. The date on which the statement was made;

[3] The government also refused, at this time, to answer Request 14 (R. 78), but an answer to this question was provided on March 14 (R. 12, 45–52).

c. The place where it was made;

d. The substance of the statement;

e. Whether the persons to whom the statement was made was a Government Agent at the time of the statement;

f. The names and addresses of any other persons present at the time the statement was made; and

g. Whether a written memorandum or verbatim transcript of the oral statement was made, and, if so, whether the Government has possession of the memorandum or transcript.

At the hearing on March 14, 1966 (R. 89–106), the government pointed out that it had now given the defense its entire case, with the exception of oral statements made by Horwitz himself, and it again specifically asked petitioner to vacate his order directing that Request 25 be answered (R. 90). The government further narrowed the issue as to Request 25 by agreeing to give the defense all oral statements made by Horwitz to government agents (R. 92–93), thus limiting its objection to oral statements by Horwitz to third-party informants who were not participants in the alleged offense[4] (R. 93, 94–96, 102). The government urged that there was always a danger that such witnesses would be subjected to improper pressures if their identities were revealed (R. 94, 98–99; cf. R. 76).

[4] Petitioner changed his mind several times about whether to require the government to answer Request 25(d) by giving the substance of oral statements made by Horwitz to informants. Ultimately, he decided that the government should reveal the substance of statements made to government agents, but not the substance of those made to third-party informants (R. 79, 84–89, 92–93, 98).

But petitioner, noting that the government had attempted no specific showing of such a danger in this case, refused to change his ruling (R. 93–103; cf. R. 76–78).

The government then obtained from the court of appeals a stay of further proceedings and, on March 21, 1966, filed with that court a petition for a writ of mandamus directing petitioner to vacate his order that it answer Request 25 (R. 1–7). On March 24, 1966, the court ordered petitioner to show cause why the writ should not issue (R. 61–62). On July 12, 1966, a panel of the court of appeals denied the writ (R. 110–111), but upon the government's motion for reconsideration the panel, on October 4, 1966, issued the writ as requested by the government. On December 5, 1966, the court *en banc* denied petitioner's request for a rehearing (R. 112–114).

ARGUMENT

INTRODUCTION AND SUMMARY

Petitioner, a federal district judge, has acknowledged the adoption of a uniform rule in his courtroom requiring the government in a criminal case to furnish the defense, on motion for a bill of particulars, a list of potential witnesses. Applying this policy in the instant tax-evasion case, Judge Will ordered the government to turn over to the defense the names and addresses of all individuals to whom or in whose presence the defendant had made admissions or other relevant statements. Rather than comply, the government sought and obtained from the court of appeals a writ of mandamus directing Judge Will to vacate

his order. Two issues are presented: whether his order constituted an abuse of discretion, and, if so, whether it could properly be corrected by mandamus.

1. Petitioner's flat rule requiring the government to furnish a list of potential witnesses might be quite appropriate if the liberal notions of discovery embodied in the Federal Rules of Civil Procedure had been carried over into the criminal rules; but they were not. Concern with the danger of witness intimidation and fabrication of defenses has resulted in sharply circumscribing the criminal defendant's right to pre-trial discovery; and less than two years ago, this Court, in amending the criminal rules, rejected urgings to reverse this policy.

That is not to say that a defendant is never entitled to any glimpse of the government's case in advance of trial. He is entitled to sufficient disclosure to enable him to prepare his defense and to enter a plea of double jeopardy in the event of a subsequent prosecution for the same offense. The proper office of the bill of particulars is to protect these interests. The broad disclosure compelled here was not based on such considerations. Rather, Judge Will's rule reflects unwillingness to accept the traditional limitations upon criminal discovery.

It is also at war with this Court's rulings relating to the informant's privilege. Recognizing the privilege's importance to law enforcement, the Court has indicated that it should not be overridden in an individual case unless the particular circumstances require. Judge Will made no effort to ascertain the particular needs of the defendant. In fact, it is clear

that since the government had undertaken in this case to disclose the informants' identity at the time of trial, defendant's only interest is the enjoyment of the very advantage traditionally denied criminal defendants—pre-trial discovery. That interest cannot outweigh the public interest in shielding informants from pre-trial harassment.

2. Mandamus will lie to correct a district judge's persistent disregard of the requirements of the federal rules, whether or not his error be deemed of jurisdictional magnitude. Mandamus has also been held by this Court to be an appropriate procedure for testing fundamental questions of first impression concerning the interpretation of those rules; and the present case, touching as it does a basic—and, in light of the recent amendments to the rules, novel—question of criminal procedure, clearly meets that criterion, too. Nor is there any other feasible procedure whereby to obtain a determination of the question by the appellate courts—whose duty it is, after all, to assure the uniform interpretation and application of the federal procedural rules.

Mandamus is not unsuitable merely because the procedural issue here arises in the context of a criminal proceeding. The supervisory responsibilities of the federal appellate courts over district judges are, if anything, greater in the criminal than in the civil sphere. And the policy that circumscribes government appeals in criminal cases is not undermined, so long as mandamus is reserved for extraordinary circumstances. Judge Will's persistent disregard of a funda-

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mental tenet of federal criminal procedure cannot be likened to a routine ruling, as to which—we readily concede—mandamus should not lie.

I. IN HIS RULING UPON THE DEFENDANT'S REQUEST FOR A BILL OF PARTICULARS, JUDGE WILL CLEARLY EXCEEDED HIS AUTHORITY UNDER THE FEDERAL RULES OF CRIMINAL PROCEDURE. MOREOVER, THE RULING INSTANCES HIS PERSISTENT DISREGARD OF THE LIMITED SCOPE OF DISCOVERY PERMITTED BY THE FEDERAL CRIMINAL RULES

A. Rule 7(f) of the Federal Rules of Criminal Procedure authorizes the district court to direct the filing of a bill of particulars. No criteria are specified, and the court's discretion is broad. *Wong Tai* v. *United States,* 273 U.S. 77, 82. But that discretion must, of course, be exercised within the limitations prescribed by the federal rules. One such limitation is upon pretrial discovery. Unlike the civil rules, the criminal rules allow discovery only in narrowly limited circumstances, not here relevant. See Rules 15, 16; *Bowman Dairy Co.* v. *United States,* 341 U.S. 214. Consistently with this settled policy, bills of particulars have been granted to protect the defendant against a second prosecution for the same offense and to enable him to prepare his defense without fear of unfair surprise (*Norris* v. *United States,* 152 F. 2d 808, 811 (C.A. 5), certiorari denied, 328 U.S. 850), but not to compel disclosure of the government's evidence in advance of trial (*United States* v. *Kushner,* 135 F. 2d 668, 673 (C.A. 2), certiorari denied, 320 U.S. 212; *United States* v. *Lebron,* 222 F. 2d 531, 535–536 (C.A. 2), certiorari denied, 350 U.S. 876; *Downing* v. *United*

States, 348 F. 2d 594, 599 (C.A. 5), certiorari denied, 382 U.S. 901).

Some have thought the limitations on the scope of criminal discovery unwise and unwarranted; others have defended them, noting that, with life or liberty at stake, a criminal defendant apprised well in advance of trial of the details of the government's case might be tempted to procure perjured testimony or intimidate government witnesses (*e.g., State* v. *Tune,* 13 N.J. 203, 210–211, 98 A. 2d 881 (Vanderbilt, C.J.)). We do not enter upon that controversy here. It has been stilled for the time at least by this Court's refusal, in recently amending the Federal Rules of Criminal Procedure, to adopt the broad discovery provisions urged vigorously upon it from some quarters. See, *e.g., Discovery in Federal Criminal Cases,* 33 F.R.D. 47, 95–96 (Symposium at the Judicial Conference of the District of Columbia Circuit, 1963); Traynor, *Ground Lost and Found in Criminal Discovery,* 39 N.Y.U. L. Rev. 228 (1964).[5] Even if this Court were disposed so soon to re-examine its decision to retain the

[5] It is true that Rule 7(f) was amended (effective July 1, 1966) to eliminate the requirement that cause be shown by the defendant to direct the filing of a bill of particulars by the government, and that the Notes of the Advisory Committee state that the object of the amendment was to liberalize the granting of bills of particulars. There is no indication, however, of any purpose to transform the bill of particulars into an instrument of broad discovery. Had that been this Court's design, surely it would have amended the rules which deal with discovery—Rules 15 and 16. We note also that the government's petition for mandamus was filed in the court of appeals before the effective date of the new rules—at a time, that is, when the former and more restrictive rules remained technically in force.

traditional limitations upon criminal discovery, this case hardly presents an appropriate occasion. Fully pertinent here is the Chief Justice's observation for the Court in *United States* v. *Isthmian S.S. Co.*, 359 U.S. 314, 323, that "[w]hether the setoff and cross-libel procedure [of the Admiralty Rules prescribed by this Court] now operative in admiralty is anachronistic, is not a matter best considered by this Court in a litigation without the benefits which normally accompany intelligent rulemaking—including hearings and opportunities to submit data."[6]

A corollary to the principle which limits discovery in federal criminal cases is that the government is rarely required to furnish the names of its witnesses in advance of trial. *United States* v. *Eddington*, 328 F. 2d 760, 761 (C.A. 7), certiorari denied, 379 U.S. 818; *United States* v. *Lebron*, 222 F. 2d 531, 535–536 (C.A. 2), certiorari denied, 350 U.S. 876; Symposium, *supra*, 33 F.R.D. at 105; Traynor, *supra*, 39 N.Y.U. L. Rev. at 233. This is consistent, of course, with the federal statute which requires the furnishing of a witness list *only* in a capital or treason case, and then only three days before commencement of trial. 18 U.S.C. 3432; see *United States* v. *Van Duzee*, 140 U.S. 169, 173. One of the changes most vigorously urged by those who advocated a liberalization of the discovery provisions of the criminal rules was adoption of a requirement that the names and addresses of gov-

[6] The Court also noted that Congress has entrusted the Judicial Conference of the United States with advisory responsibilities in the area of procedure (see Act of July 11, 1958, 72 Stat. 356) that decisional modification of the federal rules would circumvent.

ernment witnesses be furnished to the defendant in advance of trial. Symposium, *supra,* at 96; see Traynor, *supra,* at 236, 244. No such amendment was made. Quite obviously, a witness list is a powerful—is indeed the critical—discovery tool. Equipped with such a list, a defendant should have little trouble ferreting out the government's evidence and piecing together the details of the government's case. To furnish such lists routinely would expose the government's witnesses to intimidation and mark a substantial inroad into the policy of limited criminal discovery that this Court, as we have noted, has so far declined to change.

B. Despite the settled limitations upon the scope of criminal discovery, Judge Will in this case ordered the government, as a matter of course, without any showing by the defense of special need, to furnish the defendant with a list containing the names and addresses of all private individuals to whom, or in whose presence, defendant had made admissions or other statements relevant to the criminal charges.[7] Such a list, plainly, would expose the heart of the government's case by revealing to the defense the individuals who could furnish the most damaging direct testimony of defendant's guilt—testimony as to his own admissions. It would thus constitute a potent tool of discovery. But it is difficult to see how production of such a list could, in the circumstances of this case, be justified as necessary to prevent unfair surprise. In response to the motion for a bill of particulars, the government furnished the defendant with allegations as to the specific acts committed by him; the correct

[7] The government was willing to produce the names of any government officers to whom such statements had been made.

amount of corporate gross sales for each year; the amount and the source of the unreported sales; the amount and the source of the deductions allowed by the government; the fact that none of the claimed deductions were disallowed; a complete list of the corporate books, records and other documents upon which the government was relying; the government's theory of the case, including the fact that it was not relying upon net worth proof; the entries on the tax return that were alleged to be untrue; the fact that the government did not rely upon any written statement made by the defendant; a list of more than 250 specific items of unreported corporate receipts between October 6, 1958, and December 31, 1959; and the dates, amounts and payors of specific sales which had not been entered on the corporate books. Moreover, defendant is in a better position than anyone else to know the circumstances of his own admissions or statements on which the government might be relying. In short, the additional disclosures which Judge Will has ordered seem hardly necessary to avoid unfair surprise or to predicate a later plea of double jeopardy.

Nor did Judge Will justify his order by reference to considerations traditionally deemed relevant to requests for bills of particulars. He stated that the burden was on the government to establish that the defendant was not entitled to the names of witnesses, and that if this burden were not met "I don't see any reason for being secretive about who your witnesses are." (R. 65, 66.) He said: "I have great concern that in a civil case we require both sides to submit their

witnesses to maximum deposition when all that is involved is money. In a criminal case, the government doesn't even want to disclose the name of a person so the other side can go out and interview when what is concerned is life or liberty. To me this is a very strange aberration of the processes of justice as between civil and criminal cases." (R. 75.) Most pointedly, Judge Will stated that he "would go further" than the Advisory Committee on Criminal Rules whose proposals were then pending before this Court (R. 77). In fact, Judge Will freely acknowledged that he has adopted a rule whereby the defendant in every criminal case is automatically entitled to "a reasonable opportunity to know * * * who was present * * * and then let the defendant go out and interview the people if he so desires and see what they are going to say." (R. 71.) He avowed that it is his invariable rule to require the government "to identify the people with whom the defendant is supposed to have participated in an illegal act but who were present." (R. 70–71.) In sum, his rationale is that the criminal defendant is entitled to a discovery opportunity analogous to that vouchsafed to civil parties. Whatever the abstract merits of this approach, it is in patent conflict with existing law.

C. Such a rule of disclosure also offends the teachings of *Roviaro* v. *United States,* 353 U.S. 53, and *Rugendorf* v. *United States,* 376 U.S. 528, that the informant's privilege is important and will yield only to a particularized showing of need in an individual case. Cf. *McCray* v. *Illinois,* 386 U.S. 300. In ruling that, regardless of circumstances, the defendant is entitled

to know who was present when he made any statements relating to the alleged crime, Judge Will has ignored the rulings in *Roviaro* that the informant's privilege is important for "the furtherance and protection of the public interest in effective law enforcement" (355 U.S. at 59) and that a decision whether it should yield in an individual case depends upon the particular circumstances at hand, rather than upon rigid rules (*id.* at 62).[8] The present circumstances are far removed from those in *Roviaro,* where the informant was the sole participant (other than the accused) in the transaction giving rise to the alleged offense and hence the "only witness in a position to amplify or contradict the testimony of government witnesses" who had observed the offense from some distance (*id.* at 64). The Court held that "under these circumstances" disclosure was required (*id.* at 65). No comparable circumstances are present here; in the instant case (as in *Rugendorf*) the defendant wholly "failed to develop the criteria of *Roviaro* necessitating disclosure * * *." 376 U.S. at 535.

We stress that here (unlike *Roviaro*) the government has promised to make available to the defendant at trial the names of any individuals (besides those who testify) who heard his admissions (R. 97, 99–100). Since the defendant will ultimately have an opportunity to hear the testimony (or, in any event, learn the identity) of the informants, his interest in immediate disclosure is no more than a desire to enjoy the advantages of pre-trial discovery—a privilege, as

[8] Judge Will's offer to permit the government to prove that the defendant in the present case would, in fact, be likely to intimidate witnesses or fabricate a defense is small comfort; such proof is rarely possible.

we have seen, denied defendants under the criminal rules. This doubtful interest cannot override the "public interest in protecting the flow of information" (*Roviaro, supra,* 353 U.S. at 62), which entitles the government to shield its informants from harassment prior to trial (see *United States* v. *Schneiderman,* 104 F. Supp. 405, 409 (S.D. Cal.); cf. *Pittsburgh Plate Glass Co.* v. *United States,* 360 U.S. 395, 400)—at least in the absence of a showing of particularized need, not attempted here, for immediate disclosure.

II. THE COURT OF APPEALS HAD AUTHORITY TO ISSUE A WRIT OF MANDAMUS TO CORRECT JUDGE WILL'S PERSISTENT REFUSAL TO OBSERVE THE LIMITATIONS IMPOSED BY THE FEDERAL RULES OF PROCEDURE UPON DISCOVERY IN CRIMINAL CASES

We have urged, under Point I, that Judge Will has exhibited a persistent disregard for the settled limitations which the Federal Rules of Criminal Procedure impose upon discovery, as evidenced by his action in the present case in directing the government to furnish—in practical effect—the particulars of its evidence. This refusal, we have argued, is not isolated or marginal error but a clear abuse of discretion. It remains to consider whether, as the court of appeals believed, such an abuse may be corrected by mandamus. We think so.

A. The All Writs Act, 28 U.S.C. 1651(a), empowers the federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." As this Court stated in *Roche* v. *Evaporated Milk Assn.,* 319 U.S. 21, 26, "The traditional use of the writ [of mandamus] in aid of appellate jurisdiction both at common law and in the federal courts has been to confine

an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." See, *e.g., Ex parte Peru,* 318 U.S. 578, 584, and cases cited. However, even in *Roche,* the Court made clear that the concept of a "jurisdictional error," the only kind correctible by mandamus, was not a narrow or technical one. Not only did the Court reject, as inappropriate to the deployment of an extraordinary remedy, "formal rules rigorously controlling judicial action" (319 U.S. at 26); it made clear that among the special circumstances justifying the issuance of the writ was "persistent disregard of the Rules of Civil Procedure prescribed by this Court" (*id.* at 31).

Later cases have abandoned the jurisdictional touchstone of the writ's availability altogether, stressing, rather, its propriety as a corrective of serious misinterpretations of the federal rules in instances where the ordinary remedy of appeal is inadequate. In *LaBuy* v. *Howes Leather Co.,* 352 U.S. 249, the Court—over vigorous dissent—upheld as proper the issuance of the writ by a court of appeals to correct a district court's practice of referring to masters cases that were not truly "exceptional" within the meaning of Rule 53(b) of the Federal Rules of Civil Procedure. The jurisdiction of the district court to make such references was not questioned. The Court described the unjustified references as constituting "little less than an abdication of the judicial function" (352 U.S. at 256). But Rule 53(b) was, of course, an express grant of authority. In nevertheless upholding the use of the writ

this Court emphasized "that supervisory control of the District Courts by the Courts of Appeals is necessary to proper judicial administration in the federal systems" (*id.* at 260) and that the improper practice indulged by the district court had been frequent rather than isolated (*id.* at 258).

The principle of *LaBuy*—that in appropriate circumstances mandamus will lie to compel a district judge to comply with the federal rules of procedure whether or not he has actually exceeded his jurisdiction—was reaffirmed, quite recently, in *Schlagenhauf* v. *Holder,* 379 U.S. 104. The district court had ordered the defendant in a personal-injury case to undergo a medical examination, and the court of appeals had refused to issue a writ of mandamus directing the district court to vacate its examination order. The initial question for this Court was whether the order could properly be reviewed by mandamus. The Court was unanimous that it could be. There was no jurisdictional issue in the usual sense. The district court's jurisdiction of the parties and of the subject matter of the suit was not questioned, the only dispute being over the court's power under Rule 35(a). Nor did this Court cast the issue in jurisdictional terms. It declared that "[t]he writ is appropriately issued * * * when there is 'usurpation of judicial power' or a clear abuse of discretion" (379 U.S. at 110) and that "the basic, undecided question of whether a district court could order the mental or physical examination of a defendant" was the type of issue appropriately reviewed by mandamus (*ibid.*).

B. It would now seem settled, and beyond serious dispute,[9] that the courts of appeals have the power to correct by mandamus district court rulings which evince a clear and persistent disregard of the federal rules of procedure or involve a fundamental issue of first impression. The present case meets both criteria. As in *LaBuy*, the action of the district court challenged here—Judge Will's approval of the use of the bill of particulars as a device to compel criminal discovery—represents no isolated error, but a persistent practice by this district judge, and one that we have argued is clearly, not merely debatably, contrary to the federal rules. A pattern of manifest non-compliance with the rules governing federal criminal trials would appear to present a clear-cut instance for a court of appeals to exercise its supervisory authority over the district courts of its circuit. And, as in *Schlagenhauf*, the issue in the present case is both one of fundamental importance—since, if Judge Will's view of the scope of criminal discovery prevails, it is obvious that the character of federal criminal proceedings will be markedly altered—and one of first impression, in view of the recent amendments of the criminal rules.

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[9] The decisions of the courts of appeals have been fully consonant with the liberal view expressed in *LaBuy* and *Schlagenhauf*. *E.g.*, *Atlass* v. *Miner*, 265 F. 2d 312 (C.A. 7), affirmed without consideration of the propriety of the use of the writ, 363 U.S. 641; *In re Watkins*, 271 F. 2d 771 (C.A. 5); *Hartley Pen Co.* v. *United States District Court*, 287 F. 2d 324 (C.A. 9). The Second Circuit decision, *United States* v. *Bondy*, 171 F. 2d 642 (C.A. 2), on which petitioner relies (Br. 26–27), is no longer followed in that circuit. See *United States* v. *Cashin*, 281 F. 2d 669, 671 (C.A. 2).

Nor is the authority of *LaBuy* and *Schlagenhauf* weakened in the present context by the fact that they were civil, rather than criminal, cases. In our view, their principles apply with equal force in the criminal area, as the courts of appeals have uniformly supposed (*In re United States,* 348 F. 2d 624 (C.A. 1); *United States* v. *Igoe,* 331 F. 2d 766 (C.A. 7), certiorari denied, 380 U.S. 942; *United States* v. *Cashin,* 281 F. 2d 671 (C.A. 2); *United States* v. *United States District Court,* 209 F. 2d 575 (C.A. 6)); this Court itself, we point out, has approved the use of the writ in criminal cases (*United States* v. *Smith,* 331 U.S. 469; *Ex parte United States,* 287 U.S. 241; *Ex parte United States,* 242 U.S. 27; cf. *Platt* v. *Minnesota Mining & Mfg. Co.,* 376 U.S. 240).

The supervisory responsibilities of the courts of appeals and of this Court are certainly not less in the criminal than in the civil sphere; they may indeed be greater. See, *e.g., McNabb* v. *United States,* 318 U.S. 332; *Rea* v. *United States,* 350 U.S. 214. It would be anomalous, therefore, if there were no mechanism for ensuring the compliance of the district courts with the rules prescribed by this Court (with the assent of Congress) for criminal proceedings. Yet that, in effect, is the result for which petitioner here contends. To be sure, the government could disobey Judge Will's ruling, and if the indictment were, in consequence, dismissed by him, an appeal might lie (see 18 U.S.C. 3731)—as it would if a contempt judgment were entered against the government attorney. See *In re United States,* 348 F. 2d 624, 625 (C.A. 1). But, surely, the remedy of

mandamus is much to be preferred to a procedure—uncertain[10] and unseemly—that requires the government, as the condition of obtaining appellate review, to flout the district court's ruling. Cf. *United States* v. *Mine Workers,* 330 U.S. 258.

Petitioner notes that the occasions on which the government may appeal in a criminal case are sharply limited, and argues that the policy which this limitation reflects could be defeated if mandamus were freely available to the government to contest rulings of the trial judge in a criminal case. But we do not urge the appropriateness of mandamus as a routine method of review, or quarrel with this Court's frequent statements that the writ is to be reserved for "special circumstances" (*e.g., Schlagenhauf,* 379 U.S. at 111). We assume that, in the criminal as in the civil sphere, the writ will not issue where "the most that could be claimed is that the district courts have erred in ruling on matters within their jurisdiction." *Parr* v. *United States,* 351 U.S. 513, 520. We have been at pains to suggest that the circumstances of the present case are indeed special. Here, a federal judge has applied his consistent interpretation of the federal rules as authorizing (in effect) discovery against the government in a criminal case. This is not a routine rul-

[10] Initially, Judge Will suggested that, rather than dismiss the indictment or hold the government attorney in contempt, he would simply postpone the date of trial indefinitely (R. 78–80). Had he done so, the government could not have appealed. Moreover, some courts view a dismissal of an indictment on grounds unrelated to the validity of the indictment itself as beyond the scope of the Criminal Appeals Act. *E.g., United States* v. *Apex Distributing Co.,* 270 F. 2d 747 (C.A. 9).

ing. It raises an issue of obvious importance that should be promptly and authoritatively resolved. To recognize the availability of mandamus—the only practical remedy—in such a case would not invite its wholesale and undiscriminating use as a substitute for appeal.

CONCLUSION

The judgment of the court of appeals, issuing a writ of mandamus against petitioner, should be affirmed.

Respectfully submitted.

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APPENDIX

The Federal Rules of Criminal Procedure (as amended to July 1, 1966) provide in pertinent part:

RULE 7. THE INDICTMENT AND THE INFORMATION

* * * * *

(f) BILL OF PARTICULARS. The court may direct the filing of a bill of particulars. A motion for a bill of particulars may be made before arraignment or within ten days after arraignment or at such later time as the court may permit. A bill of particulars may be amended at any time subject to such conditions as justice requires.

RULE 15. DEPOSITIONS

(a) WHEN TAKEN. If it appears that a prospective witness may be unable to attend or prevented from attending a trial or hearing, that his testimony is material and that it is necessary to take his deposition in order to prevent a failure of justice, the court at any time after the filing of an indictment or information may upon motion of a defendant and notice to the parties order that his testimony be taken by deposition and that any designated books, papers, documents or tangible objects, not privileged, be produced at the same time and place. If a witness is committed for failure to give bail to appear to testify at a trial or hearing, the court on written motion of the witness and upon notice to the parties may direct that his deposition be taken. After the deposition has been subscribed the court may discharge the witness.

(b) NOTICE OF TAKING. The party at whose instance a deposition is to be taken shall give to every other party reasonable written notice of the time and place for taking the deposition. The notice shall state the name and address of each person to be examined. On motion of a party upon whom the notice is served, the court for cause shown may extend or shorten the time.

(c) DEFENDANT'S COUNSEL AND PAYMENT OF EXPENSES. If a defendant is without counsel the court shall advise him of his right and assign counsel to represent him unless the defendant elects to proceed without counsel or is able to obtain counsel. If it appears that a defendant at whose instance a deposition is to be taken cannot bear the expense thereof, the court may direct that the expenses of travel and subsistence of the defendant's attorney for attendance at the examination shall be paid by the government. In that event the marshal shall make payment accordingly.

(d) HOW TAKEN. A deposition shall be taken in the manner provided in civil actions. The court at the request of a defendant may direct that a deposition be taken on written interrogatories in the manner provided in civil actions.

(e) USE. At the trial or upon any hearing, a part or all of a deposition, so far as otherwise admissible under the rules of evidence, may be used if it appears: That the witness is dead; or that the witness is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or that the witness is unable to attend or testify because of sickness or infirmity; or that the party offering the deposition has been unable to procure the attendance of the witness by subpoena. Any deposition may also be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness. If only a part of a dep-

osition is offered in evidence by a party, an adverse party may require him to offer all of it which is relevant to the part offered and any party may offer other parts.

(f) OBJECTIONS TO ADMISSIBILITY. Objections to receiving in evidence a deposition or part thereof may be made as provided in civil actions.

RULE 16. DISCOVERY AND INSPECTION

(a) DEFENDANT'S STATEMENTS; REPORTS OF EXAMINATIONS AND TESTS; DEFENDANT'S GRAND JURY TESTIMONY. Upon a motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph any relevant (1) written or recorded statements or confessions made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, (2) results or reports of physical or mental examinations, and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government and (3) recorded testimony of the defendant before a grand jury.

(b) OTHER BOOKS, PAPERS, DOCUMENTS, TANGIBLE OBJECTS OR PLACES. Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph books, papers, documents, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, upon a showing of materiality to the preparation of his defense and that the request is reasonable. Except as provided in subdivision

(a)(2), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by government agents in connection with the investigation or prosecution of the case, or of statements made by government witnesses or prospective government witnesses (other than the defendant) to agents of the government except as provided in 18 U.S.C. § 3500.

(c) DISCOVERY BY THE GOVERNMENT. If the court grants relief sought by the defendant under subdivision (a)(2) or subdivision (b) of this rule, it may, upon motion of the government, condition its order by requiring that the defendant permit the government to inspect and copy or photograph scientific or medical reports, books, papers, documents, tangible objects, or copies or portions thereof, which the defendant intends to produce at the trial and which are within his possession, custody or control, upon a showing of materiality to the preparation of the government's case and that the request is reasonable. Except as to scientific or medical reports, this subdivision does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or his attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by government or defense witnesses, or by prospective government or defense witnesses, to the defendant, his agents or attorneys.

(d) TIME, PLACE AND MANNER OF DISCOVERY AND INSPECTION. An order of the court granting relief under this rule shall specify the time, place and manner of making the discovery and inspection permitted and may prescribe such terms and conditions as are just.

(e) PROTECTIVE ORDERS. Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted

or deferred, or make such other order as is appropriate. Upon motion by the government the court may permit the government to make such showing, in whole or in part, in the form of a written statement to be inspected by the court *in camera*. If the court enters an order granting relief following a showing *in camera*, the entire text of the government's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal by the defendant.

(f) TIME OF MOTIONS. A motion under this rule may be made only within 10 days after arraignment or at such reasonable later time as the court may permit. The motion shall include all relief sought under this rule. A subsequent motion may be made only upon a showing of cause why such motion would be in the interest of justice.

(g) CONTINUING DUTY TO DISCLOSE; FAILURE TO COMPLY. If, subsequent to compliance with an order issued pursuant to this rule, and prior to or during trial, a party discovers additional material previously requested or ordered which is subject to discovery or inspection under the rule, he shall promptly notify the other party or his attorney or the court of the existence of the additional material. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may order such party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may enter such other order as it deems just under the circumstances. As amended Feb. 28, 1966, eff. July 1, 1966.

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No. 36

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

HONORABLE HUBERT L. WILL, Judge, United States District Court for the Northern District of Illinois,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

PETITIONER'S REPLY BRIEF

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On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

PETITIONER'S REPLY BRIEF

I. The Extraordinary Writ Was Improperly Issued.

The Government seeks through a two step process to support the use of mandamus below. First, that the test of *Roche* v. *Evaporated Milk Ass'n.*, 319 U.S. 21, 26, permitting the use of mandamus to confine the lower court to to the exercise of its lawful jurisdiction has been "aban-

doned" in favor of its use "as a corrective of serious misinterpretations of the Federal Rules in instances where the ordinary remedy of appeal is inadequate" (Br. 22),[1] citing *LaBuy* v. *Howe's Leather Co.*, 352 U.S. 249; or, that the writ may be used as "an appropriate procedure for testing fundamental questions of first impression concerning the interpretation of [the Federal] rules" (Br. 13), relying on *Schlagenhauf* v. *Holder*, 379 U.S. 104. Secondly, that these principles should apply to criminal cases as well as civil (Br. 25).

In each respect these contentions are inapposite. In *LaBuy* v. *Howe's Leather Co.*, 352 U.S. 249, this Court founded the use of the writ on its being "in aid of appellate jurisdiction" as originally asserted in *Roche* v. *Evaporated Milk Ass'n.*, 319 U.S. 21:

> "Since the Court of Appeals could at some stage of the anti-trust proceedings entertain appeals in these cases, it has power in proper circumstances, as here, to issue writs of mandamus reaching them. Roche, supra (319 U.S. at 25), and cases there cited." (p. 255)

Here, of course, the Court of Appeals had no assurance that at some stage it could entertain an appeal since the case below was a criminal proceeding. But, more importantly, *LaBuy* said no more than that, in a civil case, "a clear abuse of discretion" (p. 257) was that which permitted the use of the writ.

Since the Government's contention is based in essence upon "clear abuse of discretion" in that Judge Will engaged in a "persistent disregard of the requirements of the federal rules" (Br. 13), the touchstone of the Government's argument is falsely founded and does not accurately reflect the status of the record (See pp. 5-10, *infra*).

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[1] Citation is to Brief For the United States.

Certainly, if mandamus is appropriate in a criminal proceeding under those circumstances, it was nevertheless inappropriately applied below.

The Government's *Schlagenhauf* argument for the issuance of the writ is geared to the assertion that Judge Will was lacking in power to order the disputed request and that such order is one of the first impression. *Schlagenhauf* v. *Holder*, 379 U.S. 104. Unlike *Schlagenhauf* where the challenged order was the first of its kind in any reported decision in the Federal courts under Rule 35, the disclosure of the names of potential witnesses by the use of Rule 7(f) is not unique and is widely reported (see cases at pp. 42-43 of Petitioner's Brief). Furthermore, it would appear that furnishing the names of third persons to whom the defendant has made statements material to the proceedings in this Internal Revenue case is less than what appears to be authorized by present Rule 16(a)(1) of the Federal Rules of Criminal Procedure.[2] In addition, it cannot effectively be contended that petitioner lacked the power, within the meaning of *Schlagenhauf*, to furnish this kind of information when this court has specifically indicated that Rule 7(f) is appropriate to disclose names of

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[2] It is apparent that what was ordered furnished may now be obtained under Rule 16(a)(1) since the government has in this case, as in most Internal Revenue cases, "statements signed by every witness who will testify for the government" (R. 87):

> "Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph any relevent (1) written or recorded statements or confessions made by the defendant, or copies thereof, within the possession, coustody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government. . . ."

potential witnesses. *Roviaro* v. *United States*, 353 U.S. 53; *Kirby* v. *United States*, 174 U.S. 47; *United States* v. *Debrow*, 346 U.S. 374.

Finally, while the Government would agree that mandamus as a tool for governmental review of interlocutory orders in a criminal case should be unavailable if the ruling is "routine" (Br. 14, 26) the precise breadth of that test as urged is never disclosed. While petitioner has urged at length in his Brief (pp. 16-20) that the use of mandamus should be applied differently in criminal cases, the Government would make no distinction except for prohibiting mandamus to "routine rulings". To create the slightest extension of the use of the extraordinary writ to criminal cases other than when the order of the lower court deprives the prosecution of its right to trial permitted by law or to the results of a proper conviction would open the floodgates to piecemeal review and effectively disrupt the speedy and orderly disposition of criminal trials. Disputed evidentiary rulings at trial could lead to applications for mandamus while the trial itself awaited action by "the supervisory authority" of the higher courts; unfavorable pretrial orders might cause repeated recourse to the Court of Appeals ultimately to the great detriment of the defendant.

Simply put, mandamus should not be available to the sovereign for review of an interlocutory order in a criminal case merely because of an alleged abuse of discretion. Mandamus must fail here because the petitioner did not so abuse his discretion. But more importantly, if mandamus is to be permitted at all in such situations, it should be strictly circumscribed not by judicial fiat but by Congressional action. Until such time as Congress acts, the extraordinary writ should be used only to control a pro-

cedural order in a criminal case within the district court's jurisdiction where it deprives the prosecution of its right to trial permitted by law or to the results of a proper conviction.

II. Weighing All Relevant Factors, Judge Will Acted Within His Jurisdiction and Did Not Abuse His Conceded Discretion.

The United States apparently does not dispute the fact that the Courts have often disclosed the names of actual or potential witnesses by a bill of particulars, or have discussed such disclosure with approval (Pet. Br. pp. 42-43).[3] While admitting the district court is vested with broad discretion to grant a bill of particulars, respondent alleges petitioner has adopted a "flat rule" (Br. 12), an "invariable rule" (Br. 19) requiring the Government "to furnish a list of potential witnesses". (Br. 12). This "rule", it is urged, constitutes "discovery" which is impermissible under the Federal Rules of Criminal Procedure, both as presently constituted and as was existent at the date of Judge Will's order, and his broad discretion under Rule 7(f) is therefore circumscribed by the discovery limitation of the Criminal Rules.

The Government claims, in essence, that he ruled as he did not because of relevant considered factors, but because he was following his "flat rule". Necessarily, therefore, it is contended that Judge Will ruled improperly because not enough "considerations traditionally deemed relevant to requests for bills of particulars" (Br. 18) were shown. The Government urges not so much that he *could* not have ordered the information given, but that he *should* not have.

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[3] Citation is to Petitioner's Brief.

This is nothing more than a claim of error in his acceptance of the factors causing him to exercise his discretion as he did. It is merely a request of a higher court to substitute its discretion for that of the district court. (See, Pet. br. pp. 34-36). It is effectively a claim by the government that Judge Will acted because of this "uniform" or "flat" rule, and that the defendant did not show enough "cause" as then required under Rule 7(f), to warrant the grant of the bill of particulars. The measure of what is sufficient "cause" need not be decided here, for it suffices to say, the determination of how much "cause" need be shown is a decision which rests within the sound judicial discretion of the trial judge. See *Wong Tai* v. *United States*, 273 U.S. 77, 82.

The record is devoid of a "flat rule". Judge Will indeed took some pain to place his decision granting the disputed request in the context and nature of the instant case:

> "Each of the questions the government seeks to strike ask for certain relevant names. The two indictments here involved charge that the gross sales amount stated on certain tax returns subscribed by the defendant is incorrect * * *
>
> "* * * The reason for requiring disclosure of their names, however, is not that they will or may be witnesses, but that the defendant requires identification of the times, places and persons present in order to prepare his defense . . ." (R. 58, 59)

See also, R. 74, 97.

Judge Will's position was simply that if these statements were "an essential element of the government's case" (R. 95) then the Government has "the duty to tell the defendant . . . where that conversation took place, what time of day or night and what day of the week and

month it was and who was present, not surveilling, but actually participating in the transaction, who can testify as to . . . what was said by one or another party to the conversation" (R. 95).

Indeed the record does not support the accusation that what was ordered by him to be furnished was pursuant to a "uniform rule in his courtroom" (Br. 11), and was a list of witnesses furnished "routinely", "as a matter of course" (Br. 17). The District Judge stated he was not and never has required the Government to disclose their evidence (R. 70) and, that he was not then requiring a disclosure of a list of witnesses (R. 69, 74, 77, 94, 95, 97) nor had he ever, in a criminal case, proposed the civil rule limiting witnesses to a furnished list (R. 77). Judge Will made it plain that he was exercising his judicial discretion (R. 74) to enable the defendant to prepare his defense (R. 76, 93, 98, 100), not to make the Government disclose its case (R. 71, 75) and to thus fulfill the function of the bill of particulars by preventing surprise at the trial which might necessitate an adjournment while the accused prepared his defense (R. 93, 100).

Though Judge Will perceived the obvious anomaly in permitting discovery through "maximum deposition" (R. 75-76) in civil cases but not in criminal cases, nevertheless to suggest (Br. 7-8, 18-19) that he was proposing the same in the instant case or had previously followed a civil-case, full discovery -deposition rule, is a perversion of the facts (R. 77). While the academic merits of full criminal discovery were exchanged,[4] his position never waivered from

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[4] " . . . if the Government doesn't have a sufficient case so that it will stand the light of day before trial, it ought not bring the case. . . . If it has to get one by because if it were examined carefully and thoroughly it would be disclosed not to have substance, then the case should not be brought." (R. 76)

his conclusion that the information requested was that which was "reasonably require[d] to prepare [the accused's] defense" (R. 76), a judgment surely and unequivocably within his judicial discretion to make under Rule 7(f).

Characteristically, the Government now urges this decision was in error because the "defendant is in a better position than anyone else to know the circumstances of his own admissions or statements on which the Government might be relying." (Br. 18) This argument, which has inherent in it the presumption of the defendant's guilt and knowledge of the facts upon which he is accused, was thought by many to have been laid to rest by Justice Whittaker (while sitting as a District Judge):

> "Nor is it any answer to a motion for a bill of particulars for the government to say: 'The defendant knows what he did, and, therefore, has all the information necessary.' This argument could be valid only if the defendant be *presumed to be guilty.* For only if he is presumed guilty could he know the facts and details of the crime. Instead of being presumed guilty, he is presumed to be innocent. Being presumed to be innocent, it must be assumed 'that he is ignorant of the facts on which the pleader founds his charges'. Fontana v. U. S., 8 Cir., 262 F. 283, 286; U. S. v. Allied Chemical & Dye Corp., D.C., 42 F.Supp. 425. This conclusion seems to me to be elementary, fundamental and inescapable." *United States* v. *Smith,* 16 F.R.D. 372, 375 (W.D. Mo. 1954).

Every disclosure of information by the Government beyond that contained in the indictment will constitute some measure of "discovery". Even the names of "in-

formants'"[5] are disclosed when required in the interests of fairness. *Roviaro* v. *United States*, 353 U.S. 53. But, the Government urges that such disclosure is outweighed by "the public interest in shielding informants from pretrial harassment." (Br. 13). The keystone of Judge Will's ruling was that the nature of the case and his determination of defendant's need, in such context, to prepare a defense, satisfied any showing of "cause" then required by the rule. Only if the Government could show need to protect the individuals would the need of the defendant be overshadowed by the privilege (R. 59-60, 75, 76). Nor can it be said that in so weighing the relevant factors to make his decision Judge Will acted beyond the standards for disclosures of "informants" as set down by this Court in *Roviaro* v. *United States*, 353 U.S. 53, 62:

> "We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's rights to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration, the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors."

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[5] Unlike most "informant" cases where it is clear either from a search warrant, or upon a trial of the merits that an "informant" in the classical sense exists, here it is impossible to so determine, other to consider an "informant" as "a non-governmental employee to whom incriminating admissions were made" (R. 102). Any "particularized need" (cf., Br. 21) disclosable after a trial on the merits is incapable of being shown in *these* circumstances. Whether such showing is presently necessary, c.f., *Dennis* v. *United States*, 384 U.S. 855, need not be herein reached.

Petitioner acted within his jurisdiction and properly exercised his authorized judicial discretion in granting the disputed request for particulars.

CONCLUSION

The judgment below should be reversed, with directions to vacate the Order issuing the writ of mandamus against Petitioner.

Respectfully submitted,

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October, 1967

SUPREME COURT OF THE UNITED STATES

No. 36.—October Term, 1967.

Honorable Hubert L. Will, Judge, United States District Court for the Northern District of Illinois, Petitioner,
v.
United States.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[November 13, 1967.]

Mr. Chief Justice Warren delivered the opinion of the Court.

The question in this case is the propriety of a writ of mandamus issued by the Court of Appeals for the Seventh Circuit to compel the petitioner, a United States District Judge, to vacate a portion of a pretrial order in a criminal case.

Simmie Horwitz, the defendant in a criminal tax evasion case pending before petitioner in the Northern District of Illinois, filed a motion for a bill of particulars, which contained thirty requests for information. The Government resisted a number of the requests, and over the course of several hearings most of these objections were either withdrawn by the Government or satisfied by an appropriate narrowing of the scope of the bill of particulars by petitioner. Ultimately the dispute centered solely on defendant's request number 25. This request sought certain information concerning any oral statements of the defendant relied upon by the Government to support the charge in the indictment. It asked the names and addresses of the persons to whom such statements were made, the times and place at which they were made, whether the witnesses to the statements were

government agents and whether any transcripts or memoranda of the statements had been prepared by the witnesses and given to the Government.[1] After considerable discussion with counsel for both sides, petitioner ordered the Government to furnish the information. The United States Attorney declined to comply with the order on the grounds that request number 25 constituted a demand for a list of prosecution witnesses and that petitioner had no power under Rule 7 (f) of the Federal Rules of Criminal Procedure to require the Government to produce such a list.

Petitioner indicated his intention to dismiss the indictments against Horwitz because of the Government's refusal to comply with his order for a bill of particulars. Before the order of dismissal was entered, however, the Government sought and obtained *ex parte* from the Seventh Circuit a stay of all proceedings in the case. The

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[1] Request number 25 originally read:

"25. If [the Government relies upon any oral statements of the defendant], state with respect to each such statement, if there was more than one:

"a. The name and address of the person to whom the statement was made;

"b. The date on which the statement was made;

"c. The place where it was made;

"d. The substance of the statement;

"e. Whether the person to whom the statement was made was a Government Agent at the time of the statement;

"f. The names and addresses of any other persons present at the time the statement was made; and

"g. Whether a written memorandum or verbatim transcript of the oral statement was made, and, if so, whether the Government has possession of the memorandum or transcript."

The Government objected *inter alia*, to compliance with part "d" on work-product grounds. At first petitioner sustained this objection and struck part "d" altogether; however, he later ordered the Government to reveal the substance of statements made to government agents, but not of those made to private parties.

Court of Appeals also granted the Government leave to file a petition for a writ of mandamus and issued a rule to show cause why such a writ should not issue to compel petitioner to strike request number 25 from his bill of particulars order. This case was submitted on the briefs, and the Court of Appeals at first denied the writ.[2] The Government petitioned for reconsideration, however, and Court of Appeals, without taking new briefs or hearing oral argument, reversed itself and without opinion issued a writ of mandamus directing petitioner "to vacate his order directing the Government to answer question 25

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[2] The order of the Court of Appeals denying the writ read, in its entirety:

"This is a petition by the government for writ of mandamus to compel respondent, a district court judge, to vacate his order which effectually directs the government in a criminal cause to give the defendant names and addresses of persons to whom defendant in said cause made oral statements to support the charges in the indictments. Briefs have been filed in this court by both parties. The court has considered the briefs and is fully informed of the points made and the positions of the parties with respect to the issue, and

"The court finds that the order subject of the petition is not an appealable order, and a review of it would offend the policy against piecemeal appeals in criminal cases, *Gobbledick* v. *United States*, 309 U. S. 323; that mandamus may not be used as a means of reviewing the non-appealable order, *Roche* v. *Evaporated Milk Association*, 319 U. S. 21; that federal courts use mandamus for the traditional purpose of confining a district court to a lawful exercise of its jurisdiction or to compel it to exercise its proper jurisdiction, *Roche* v. *Evaporated Milk Association;* that the district judge's order upon the government to furnish names and addresses of witnesses to a defendant may be erroneous, a question we do not decide, but the ruling itself was within the court's jurisdiction, *Roche* v. *Evaporated Milk Association;* that the ruling can be reviewed on appeal from a final judgment; and that there is no question here that the district judge refused to exercise his proper jurisdiction.

"It Is Therefore Ordered that the petition for writ of mandamus be and it is hereby denied."

in defendant's motion for bill of particulars." [3] We granted certiorari, 386 U. S. 955 (1967), because of the wide implications of the decision below for the orderly administration of criminal justice in the federal courts. We vacate the writ and remand the case to the Court of Appeals for further proceedings.

Both parties have devoted substantial argument in this Court to the propriety of petitioner's order. In our

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[3] The original order denying the writ was entered on July 12, 1966. On August 16, 1966, the court granted the Government's petition for reconsideration, remarking only that:

"The court finds that in the circumstances of this particular case the court should consider the merits of the ruling of the district court challenged by the government, rather than to remit the government to a radical alternative appealable judgment available to the trial judge upon the government's persistent refusal to comply;

"It is therefore ordered that the order of this court of July 12, 1966, be and it is hereby vacated, and the cause of action is taken by the court upon the petition for the writ, the briefs or both parties and the record."

Subsequently, on October 4, 1966, the Court of Appeals granted the writ. Its entire order reads as follows:

"This cause came on to be heard upon the Government's petition for writ of mandamus ordering respondent to vacate his order directing the Government to answer question 25 in defendant's motion for bill of particulars, which question sought, among other things, the names and addresses of persons to whom defendant made oral statements supporting the indictment charging wilful evasion of income tax, and which statements the Government would rely upon at the trial; upon the rule issued upon respondent to show cause why the writ should not issue; upon the brief of respondent answering the rule, and the brief of the Government; and upon the record.

"And the Court having on August 16, 1966 vacated its July 12, 1966 order denying the writ, and having reconsidered the question,

"It Is Ordered that a writ of mandamus issue as prayed in the Government's petition directing respondent to vacate his order directing the Government to answer question 25 in defendant's motion for bill of particulars."

view of the case, however, it is unnecessary to reach this question.[4] The peremptory writ of mandamus has traditionally been used in the federal courts only "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Roche* v. *Evaporated Milk Assn.*, 319 U. S. 21, 26 (1943). While the courts have never confined themselves to an arbitrary and technical definition of "jurisdiction," it is clear that only exceptional circumstances amounting to a judicial "usurpation of power" will justify the invocation of this extraordinary remedy. *DeBeers Consol. Mines, Ltd.* v. *United States*, 325 U. S. 212, 217 (1945). Thus the writ has been invoked where unwarranted judicial action threatened "to embarrass the executive arm of the Government in conducting foreign relations," *Ex parte Peru*, 318 U. S. 578, 588 (1943), where it was the only means of forestalling intrusion by the federal judiciary on a delicate area of federal-state relations, *Maryland* v. *Soper*, 270 U. S. 9 (1926), where it was necessary to confine a lower court to the terms of an appellate tribunal's mandate, *United States* v. *United States Dist. Court*, 334 U. S. 258 (1948), and where a district judge displayed a persistent disregard of the Rules of Civil Procedure promulgated by this Court, *LaBuy* v. *Howes Leather Co.*, 352 U. S. 249 (1957); see *McCullough* v. *Cosgrave*, 309 U. S. 634 (1940); *Los*

[4] It is likewise unnecessary for us to reach the question whether the writ in the circumstances of this case may be said to issue in aid of an exercise of the Court of Appeals' appellate jurisdiction. See 28 U. S. C. § 1651; *Roche* v. *Evaporated Milk Assn.*, 319 U. S. 21, 25 (1943). Compare *In re United States*, 348 F. 2d 624 (C. A. 1st Cir. 1965), with *United States* v. *Bondy*, 171 F. 2d 642 (C. A. 2d Cir. 1948). In our view, even assuming that the possible future appeal in this case would support the Court of Appeals' mandamus jurisdiction, it was an abuse of discretion for the court to act as it did in the circumstances of this case.

Angeles Brush Mfg. Corp. v. *James*, 272 U. S. 701, 706, 707 (1927) (dictum). And the party seeking mandamus has "the burden of showing that its right to issuance of the writ is 'clear and indisputable.'" *Bankers Life & Cas. Co.* v. *Holland*, 346 U. S. 379, 384 (1953); see *United States* v. *Duell*, 172 U. S. 576, 582 (1899).

We also approach this case with an awareness of additional considerations which flow from the fact that the underlying proceeding is a criminal prosecution. All our jurisprudence is strongly colored by the notion that appellate review should be postponed, except in certain narrowly defined circumstances, until after final judgment has been rendered by the trial court. See, *e. g.*, Judiciary Act of 1789, §§ 21, 22, 25, 1 Stat. 73, 83, 84, 85; *Cobbledick* v. *United States*, 309 U. S. 323, 326 (1940); *McLish* v. *Roff*, 141 U. S. 661 (1891). This general policy against piecemeal appeals takes on added weight in criminal cases, where the defendant is entitled to a speedy resolution of the charges against him. *DiBella* v. *United States*, 369 U. S. 121, 126 (1962). Moreover, "in the federal jurisprudence, at least, appeals by the Government in criminal cases are something unusual, exceptional, not favored," *Carroll* v. *United States*, 354 U. S. 394, 400 (1957), at least in part because they always threaten to offend the policies behind the double-jeopardy prohibition, cf. *Fong Foo* v. *United States*, 369 U. S. 141 (1962). Government appeal in the federal courts has thus been limited by Congress to narrow categories of orders terminating the prosecution, see 18 U. S. C. § 3731, and the Criminal Appeals Act is strictly construed against the Government's right of appeal, *Carroll* v. *United States*, 354 U. S. 394, 399–400 (1957). Mandamus, of course, may never be employed as a substitute for appeal in derogation of these clear policies. *E. g.*, *Fong Foo* v. *United States*, 369 U. S. 141 (1962);

Parr v. *United States*, 351 U. S. 513, 520–521 (1956); *Bank of Columbia* v. *Sweeny*, 1 Pet. 567, 569 (1828). Nor is the case against permitting the writ to be used as a substitute for interlocutory appeal "made less compelling . . . by the fact that the Government has no later right to appeal." *DiBella* v. *United States*, 369 U. S. 121, 130 (1962).[5] This is not to say that mandamus may never be used to review procedural orders in criminal cases. It has been invoked successfully where the action of the trial court totally deprived the Government of its right to initiate a prosecution, *Ex parte United States*, 287 U. S. 241 (1932), and where the court overreached its judicial power to deny the Government the rightful fruits of a valid conviction, *Ex parte United States*, 242 U. S. 27 (1916). But this Court has never approved the use of the writ to review an interlocutory procedural order in a criminal case which did not have the effect of

[5] Thus it is irrelevant, and we do not decide, whether the Government could appeal in the event petitioner dismissed the Horwitz indictments because of its refusal to comply with his bill of particulars order. Both parties agree that it is highly doubtful that it could appeal. See *United States* v. *Apex Distrib. Co.*, 270 F. 2d 747 (C. A. 9th Cir. 1959). The Government argues that it is unseemly to force it to defy the court in order to seek review of its order, and doubly so because it may secure review with certainty only if the United States Attorney is cited for contempt, compare *Bowman Dairy Co.* v. *United States*, 341 U. S. 214 (1951), in view of the doubtful status of its right to appeal a dismissal. But this misses the mark. Congress clearly contemplated when it placed drastic limits upon the Government's right of review in criminal cases that it would be completely unable to secure review of some orders having a substantial effect on its ability to secure criminal convictions. This Court cannot and will not grant the Government a right of review which Congress has chosen to withhold. *Carroll* v. *United States*, 354 U. S. 394, 407–408 (1957). We may assume for purposes of this decision that there may be no other way for the Government to seek review of individual orders directing it to file bills of particulars.

a dismissal. We need not decide under what circumstances, if any, such a use of mandamus would be appropriate. It is enough to note that we approach the decision in this case with an awareness of the constitutional precepts that a man is entitled to a speedy trial and that he may not be placed twice in jeopardy for the same offense.

In light of these considerations and criteria, neither the record before us nor the cryptic order of the Court of Appeals justifies the invocation of the extraordinary writ in this case.

We do not understand the Government to argue that petitioner was in any sense without "jurisdiction" to order it to file a bill of particulars.[6] Suffice it to note that Rule 7 (f) of the Federal Rules of Criminal Procedure specifically empowers the trial court to "direct the filing of a bill of particulars,"[7] and that federal trial

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[6] Nor do we understand the Government to argue that a judge has no "power" to enter an erroneous order. Acceptance of this semantic fallacy would undermine the settled limitations upon the power of an appellate court to review interlocutory orders. Neither "jurisdiction" nor "power" can be said to "run the gauntlet of reversible errors." *Bankers Life & Cas. Co.* v. *Holland*, 346 U. S. 379, 382 (1953). Courts faced with petitions for the peremptory writs must be careful lest they suffer themselves to be misled by labels such as "abuse of discretion" and "want of power" into interlocutory review of nonappealable orders on the mere ground that they may be erroneous. "Certainly Congress knew that some interlocutory orders might be erroneous when it chose to make them nonreviewable." *DeBeers Consol. Mines, Ltd.* v. *United States*, 325 U. S. 212, 223, 225 (1945) (dissenting opinion of MR. JUSTICE DOUGLAS).

[7] It should be noted that Rule 7 (f) was amended, effective July 1, 1966, to eliminate the requirement that a defendant seeking a bill of particulars make a showing of "cause." The Government argues that this amendment was not designed "to transform the bill of particulars into an instrument of broad discovery." Brief for United States, p. 15, n. 5. We intimate no view regarding the construction

courts have always had very broad discretion in ruling upon requests for such bills, compare *Wong Tai v. United States*, 273 U. S. 77, 82 (1927). Furthermore, it is not uncommon for the Government to be required to disclose the names of some potential witnesses in a bill of particulars, where this information is necessary or useful in the defendant's preparation for trial. *See, e. g., United States* v. *White*, 370 F. 2d 559 (C. A. 7th Cir. 1966). See also *United States* v. *Debrow*, 346 U. S. 374, 378 (1953).

The Government seeks instead to justify the employment of the writ in this instance on the ground that petitioner's conduct displays a "pattern of manifest noncompliance with the rules governing federal criminal trials." [8] It argues that the federal rules place settled limitations upon pretrial discovery in criminal cases, and that a trial court may not, in the absence of compelling justification, order the Government to produce a list of its witnesses in advance of trial. It argues further that in only one category of cases, *i. e.*, prosecutions for treason and other capital offenses, is the Government required to turn over to the defense such a list of its witnesses. A general policy of requiring such disclosure without a particularized showing of need would, it is contended, offend the informant's privilege. Petitioner, according to the Government, adopted "a uniform rule in his courtroom requiring the government in a criminal case to furnish the defense, on motion for a bill of particulars, a list of potential witnesses." [9] The Government concludes that since petitioner obviously had no power to adopt such a rule, mandamus will lie under this Court's decision in *LaBuy* v. *Howes Leather Co.*, 352 U. S. 249 (1957), to

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of the amendment. Petitioner's order was entered before the amendment was promulgated. The impact of the amendment on the present proceeding will, of course, be a question open upon remand.

[8] Brief for United States, p. 24.

[9] Brief for United States, p. 11.

correct this studied disregard of the limitations placed upon the district courts by the federal rules.[10]

The action of the Court of Appeals cannot, on the record before us, bear the weight of this justification. There is absolutely no foundation in this record for the Government's assertions concerning petitioner's practice. The legal proposition that mandamus will lie in appropriate cases to correct willful disobedience of the rules laid down by this Court is not controverted. But the position of the Government rests on two central factual premises: (1) that petitioner in effect ordered it to produce a list of witnesses in advance of trial; and (2) that petitioner took this action pursuant to a deliberately adopted policy in disregard of the rules of criminal procedure. Neither of these premises finds support in the record.

Petitioner repeatedly and, we think, correctly emphasized that request number 25 did not call for a list of government witnesses. He carefully noted that it was utterly immaterial under the terms of request number 25 whether the Government planned to call any of the individuals whose names were sought to the witness stand during the trial. Furthermore, it is clear as a practical matter that the Government's proof in this case, as in any prosecution of this complex nature, will extend far be-

[10] We note in passing that *LaBuy* and the other decisions of this Court approving the use of mandamus as a means of policing compliance with the procedural rules were civil cases. See *Schlagenhauf* v. *Holder*, 379 U. S. 104 (1964); *McCullough* v. *Cosgrave*, 309 U. S. 634 (1940); *Los Angeles Brush Mfg. Corp.* v. *James*, 272 U. S. 701, 706, 707 (1927) (dictum). We have pointed out that the fact this case involves a criminal prosecution has contextual relevance. See pp. —, —, *supra*. In view of our reading of the record, however, we need not venture an abstract pronouncement on the question whether this fact imposes a more stringent standard for the invocation of mandamus by the Government where the allegation is that a district judge has deviated from the federal rules.

yond mere damaging admissions of the defendant, and that witnesses will in all probability be called who have never heard Horwitz make any incriminating statements. Nor, if the list of people who have allegedly heard Horwitz make damaging admissions is long, is it likely that they will all be called to testify for the Government. Thus while the two categories have a clear probable overlap, they are not co-extensive. And, as petitioner stated in the opinion accompanying his original order to the Government to file a bill of particulars:

> "The reason for requiring disclosure of their names . . . is not that they will or may be witnesses, but that the defendant requires identification of the times, places and persons present in order to prepare his defense."

Indeed, petitioner excused the Government from answering request number 29 (a), which was so broad as to constitute in effect a demand for a list of prosecution witnesses. Finally, it should be noted that in the opinion accompanying the original order, petitioner averred his willingness to narrow the order of disclosure upon a showing by the Government "that such disclosure will involve physical risk to the individuals or prejudice the government in its ability to produce its evidence." He repeated this offer numerous times in the subsequent hearings on the Government's objections to the bill, but the United States Attorney never suggested that such a showing could be made in this case.[11]

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[11] Petitioner at one point stated to government counsel:

"I told you that any time you made a representation with any foundation in support of it that the disclosure of the name of an individual would either jeopardize him physically or jeopardize the government's proof in the case and that his testimony might be altered or effort might be made to persuade him not to testify, or something else, I am prepared to say under those circumstances of that showing we don't risk people's lives or their security, their physical well-being, and we don't encourage any possible circum-

The record is equally devoid of support for the notion that petitioner had adopted a deliberate policy in open defiance of the federal rules in matters of pretrial criminal discovery. The extended colloquy between petitioner and government counsel reveals at most that petitioner took a generally liberal view of the discovery rights of criminal defendants.[12] But petitioner was careful never

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stances in which testimony can be suppressed. That is consistent, it seems to me, with my general philosophy that you shouldn't be suppressing things; and if there is a threat of suppression then I will take the lesser suppression to prevent the greater."

Earlier, after government counsel suggested that the danger of fabricated defenses justified a policy against the disclosure of the names of potential government witnesses, petitioner replied:

"Now any evidence of a fabrication, believe me, we will deal with it. The laws of perjury—we have had convictions for perjury here, and we will have them again, I have no doubt, arising out of criminal cases, but I am not prepared to say to a defendant that you may not have the information which it seems to me you reasonably require to prepare your defense because I am afraid you or somebody helping you will lie and we won't be able to do anything about it."

Upon further inquiry, the United States Attorney made no suggestion that there was a particular danger that disclosure of the names sought by request number 25 would result in subornation of perjury.

[12] Petitioner remarked at one stage:

"You know, I have great concern that in a civil case we require both sides to submit their witnesses to maximum deposition when all that is involved is money. In a criminal case, the government doesn't even want to disclose the name of a person so the other side can go out and interview him when what is concerned is life or liberty. To me this is a very strange aberration of the processes of justice as between civil and criminal cases. When all that is involved is money, we say put your cards on the table. Where life and liberty are involved, we say to the prosecution you don't have to tell him a thing."

The Government seeks to make much of an exchange in which petitioner remarked that he would "go further" than what the

to divorce his ruling from his view of the legitimate needs of the defendant in the case before him, and there is no indication that he considered the case to be governed by a uniform and inflexible rule of disclosure.[13] Thus the

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United States Attornel referred to as "the proposed new rules of discovery under the criminal rules by the American Bar Association." The reference, according to the Government, is to the amendments to the Federal Rules of Criminal Procedure, which were pending in this Court at the time, and the exchange reveals petitioner's determination to require broad criminal discovery despite the limitations of the rules. We cannot accept this argument. In the first place, the colloquy clearly reveals that petitioner considered the proposed rules irrelevant to the question before him. In the second place, petitioner made it plain that he thought his position could in any event be rested on a reading of the proposed rules:

"The Court: . . . I would go further than they go, but they certainly go a lot further than you—a lot further.

"Mr. Schultz [United States Attorney]: They would not require the answers to these questions.

"The Court: I don't agree with that. They would not require the giving of a list of witnesses, and I don't conceive that I am . . . ."

[13] After his initial ruling that the defendant was entitled to the information sought by request number 25 because he needed it to prepare his defense adequately, petitioner continually asserted a willingness to consider any factors peculiar to the case which militated against disclosure of this information and to narrow his order in light of any such considerations. See n. 11, *supra*. Moreover, on several occasions it was petitioner who sought to narrow the focus of the discussion to the particular instance by insisting that the United States Attorney relate his generalized policy objections to the facts of the particular case:

"Mr. Schultz: We are not only talking about this case, your Honor.

"The Court: Well, I am talking about this case. That is what I am ruling on. That is what I ruled on last week or earlier this week. That is what you are asking me to reconsider, to vacate."

And again:

"Why shouldn't they have an opportunity to interview the witnesses? Why should they put them on cold at the time, or why

most that can be claimed on this record is that petitioner may have erred in ruling on matters within his jurisdiction. See *Parr* v. *United States*, 351 U. S. 513, 520 (1956). But "the extraordinary writs do not reach to such cases; they may not be used to thwart the congressional policy against piecemeal appeals." *Id.*, at 520–521. Mandamus, it must be remembered, does not "run the gauntlet of reversible errors." *Bankers Life & Cas. Co.* v. *Holland*, 346 U. S. 379, 382 (1953). Its office is not to "control the decision of the trial court," but rather merely to confine the lower court to the sphere of its discretionary power. *Id.*, at 383. Thus the record before us simply fails to demonstrate the necessity for the drastic remedy employed by the Court of Appeals.

Even more important in our view, however, than these deficiencies in the record is the failure of the Court of Appeals to attempt to supply any reasoned justification of its action. Had the Government in fact shown that petitioner adopted a policy in deliberate disregard of the criminal discovery rules and that this policy had proved seriously disruptive of the efficient administration of criminal justice in the Northern District of Illinois, it would have raised serious questions under this Court's decision in *LaBuy* v. *Howes Leather Co.*, 352 U. S. 249 (1957).[14] In *LaBuy*, however, we specifically relied upon

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should I have to recess then while they go and interview the witnesses to see what their testimony would be?

"I don't understand it, Mr. Schultz. I just don't understand in this situation—I can understand a lot of situations, but in this situation. We are not talking about some other case, but in this case, this case in which you say that there were incriminating admissions made."

[14] The Government also places reliance on *Schlagenhauf* v. *Holder*, 379 U. S. 104 (1964), arguing that it "reaffirmed" *LaBuy*. Insofar as it did so, the case does not help the Government here, since we have no quarrel with *LaBuy*, which is simply inapposite where there is no showing of a persistent disregard of the federal rules. And it

evidence in the record which showed a pattern of improper references of cases to special masters by the District Judge. 352 U. S., at 258. There is no evidence in this record concerning petitioner's practice in other cases, aside from his own remark that the Government was generally dissatisfied with it,[15] and his statements do not reveal any intent to evade or disregard the rules. We do not know what he ordered the Government to reveal under what circumstances in other cases. This state of the record renders the silence of the Court of Appeals all the more critical. We recognized in *LaBuy* that the familiarity of a court of appeals with the practice of the individual district courts within its circuit was relevant to an assessment of the need for mandamus as a corrective measure. See 352 U. S., at 258. But without an

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cannot be contended that *Schlagenhauf* on its facts supports an invocation of mandamus in this case. The Court there did note that the various questions concerning the construction of Rule 35 were new and substantial, but it rested the existence of mandamus jurisdiction squarely on the fact that there was real doubt whether the District Court had any power at all to order a defendant to submit to a physical examination.

[15] Petitioner stated that

"it is no secret that the government is disturbed that I am making available to defendants the identity of people who are alleged to have been present when transactions took place, which the government contends are illegal. . . .

". . . I have never required them to disclose their evidence, but I have required them to identify the people with whom the defendant is supposed to have participated in an illegal act but who were present."

We note merely that petitioner was careful to distinguish his practice from requiring the Government to produce its evidence or a list of witnesses. In any event, petitioner's passing remarks concerning a running dispute with the Government are insufficient to support an invocation of *LaBuy*, absent some evidence concerning petitioner's actions in other cases, or at the very least some illumination of this dialogue flowing from the Court of Appeals' experience with petitioner's general practice and its reading of Rule 7 (f).

opinion from the Court of Appeals we do not know what role, if any, this factor played in the decision below. In fact, we are in the dark with respect to the position of the Court of Appeals on all the issues crucial to an informed exercise of our power of review. We do not know: (1) what the Court of Appeals found petitioner to have done; (2) what it objected to in petitioner's course of conduct—whether it was the order in this particular case or some general practice adopted by petitioner in this and other cases; [16] (3) what it thought was the proper scope of a bill of particulars under Rule 7 (f) and what limitations it thought the criminal rules placed upon the particular or generalized discretion of a district court to order the Government to file such a bill; or (4) what relevance, if any, it attached to the fact that this order was entered in a criminal case, in assessing the availability of mandamus. We cannot properly identify the questions for decision in the case before us without illumination of this unclear record by the measured and exposed reflection of the Court of Appeals.

Due regard, not merely for the reviewing functions of this Court, but for the "drastic and extraordinary" nature

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[16] Another puzzling aspect of the action of the Court of Appeals is what it did not do. Requests 7, 14, 19, 21, 23, 25, 27, and 29 called for the disclosure of the names of persons who might conceivably be called as witnesses by the Government at Horwitz's trial. The Government objected to being required to answer requests 7, 14, 25, and 29. Ultimately petitioner excused the Government from answering request number 29, which was very broadly cast and did in effect call for a list of all potential witnesses. The Government for its part answered all the remaining requests, except number 25. The mandamus petition only placed the latter in issue, but nothing in the record indicates why either the Government or the Court of Appeals might have thought that it was within petitioner's judicial discretion under Rule 7 (f) to order the disclosure of the names sought by the other requests, but not the revelation of those sought by request number 25.

of the mandamus remedy, *Ex parte Fahey*, 332 U. S. 258, 259 (1947), and for the extremely awkward position in which its places the District Judge, *id.*, at 260, demands that a court issuing the writ give a reasoned exposition of the basis for its action.

Mandamus is not a punitive remedy. The entire thrust of the Government's justification for mandamus in this case, moreover, is that the writ serves a vital corrective and didactic function. While these aims lay at the core of this Court's decisions in *LaBuy* and *Schlagenhauf* v. *Holder*, 379 U. S. 104 (1964), we fail to see how they can be served here without findings of fact by the issuing court and some statement of the court's legal reasoning. A mandamus from the blue without rationale is tantamount to an abdication of the very expository and supervisory functions of an appellate court upon which the Government rests its attempt to justify the action below.

The peremptory common-law writs are among the most potent weapons in the judicial arsenal. "As extraordinary remedies, they are reserved for really extraordinary causes." *Ex parte Fahey*, 332 U. S. 258, 260 (1947). There is nothing in the record here to demonstrate that this case falls into that category, and thus the judgment below cannot stand. What might be the proper decision upon a more complete record, supplemented by the findings and conclusions of the Court of Appeals, we cannot and do not say. Hence the writ is vacated and the cause is remanded to the Court of Appeals for the Seventh Circuit for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES

No. 36.—October Term, 1967.

Hubert L. Will, Judge, United States District Court for the Northern District of Illinois, Petitioner, *v.* United States.	On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[November 13, 1967.]

Mr. Justice Black, concurring.

I concur in the Court's judgment to vacate and agree substantially with its opinion, but would like to add a few words, which I do not understand to be in conflict with what the Court says, concerning the writ of mandamus. I agree that mandamus is an extraordinary remedy which should not be issued except in extraordinary circumstances. And I also realize that sometimes the granting of mandamus may bring about the review of a case as would an appeal. Yet this does not deprive a court of its power to issue the writ. Where there are extraordinary circumstances, mandamus may be used to review an interlocutory order which is by no means "final" and thus appealable under federal statutes. Finality, then, while relevant to the right of appeal, is not determinative of the question when to issue mandamus. Rather than hinging on this abstruse and infinitely uncertain term, the issuance of the writ of mandamus is proper where a court finds exceptional circumstances to support such an order. In the present case it is conceivable that there are valid reasons why the Government should not be forced to turn over the requested names and that compliance with the order would inflict irreparable damage on their conduct of the

case. The trouble here, as I see it, is that neither of the courts below gave proper consideration to the possible existence of exceptional facts which might justify the Government's refusal to disclose the names. Having no doubt as to the appropriateness of mandamus, if the circumstances exist to justify it, I would vacate the judgment below and remand the case to the Court of Appeals for further deliberation on whether there are special circumstances calling for the issuance of mandamus.